

VERBATIM ¹RECORD OF TRIAL ²

(and accompanying papers)

of

MANNING, Bradley E.

(Name: Last, First, Middle Initial)

Headquarters and
Headquarters Company,
United States Army Garrison

(Unit/Command Name)

[REDACTED]

(Social Security Number)

U.S. Army

(Branch of Service)

PFC/E-3

(Rank)

Fort Myer, VA 22211

(Station or Ship)

By

GENERALCOURT-MARTIAL

Convened by

Commander

(Title of Convening Authority)

UNITED STATES ARMY MILITARY DISTRICT OF WASHINGTON

(Unit/Command of Convening Authority)

Tried at

Fort Meade, MD

(Place or Places of Trial)

on

see below

(Date or Dates of Trial)

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¹ Insert "verbatim" or "summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)

² See inside back cover for instructions as to preparation and arrangement.

1 affiliated. It's an investigative entity where the government
2 would have a duty to search.

3 But when you are talking about; and we are getting
4 further out here with the Department of State and some of these
5 other agencies; what is the defense's position?

6 Does the government have a duty to search those and what
7 do they do if the entity says no, I am not giving it to you?

8 CDC[MR. COOMBS]: Okay. So with regards to--and this is the
9 *Williams* case. What are closely aligned agencies to the
10 investigation? So in this instance, it is, without a doubt, that
11 the government and if you want to use the, Your Honor's position of
12 the--or example of the Department of State, it's without a doubt
13 that the government and the Department of State are working
14 together, as far as getting information from the Department of
15 State, such as a classification review; getting assistance from the
16 Department of State, such as their logs as to how things were
17 accessed through the net centric diplomacy. So this is not an
18 issue of some random agency that isn't closely aligned with the
19 investigation of this case. And so therefore, *Williams* is squarely
20 on point of their requirement for *Brady* to then go to that agency
21 and say, you know, to ensure that there is a *Brady* search there.
22 But, again, not to confuse that there is a *Brady* obligation that is
23 separate and apart from any request from the defense. That's just
24 an obligation that's laid on the government's doorstep.

1 MJ: Um-hmm.

2 CDC[MR. COOMBS]: Then there is specifically requested
3 items. And a lot of these items, we believe are *Brady*, we've
4 actually specifically requested. So now that gives an even more
5 onerous requirement on the government because they know exactly
6 what we are asking for, where it's at, and what we're looking for.
7 But again, you have to take a look at the government in their reply
8 to compel discovery is relying upon R.C.M. 703. They don't
9 understand the Rule. They don't understand what applies and that
10 explains why they have not given the specifically requested
11 discovery items; and that also explains why they haven't found any
12 *Brady* material; because even if you look past our own rules,
13 they're relying upon the appellate standard for *Brady*; which is
14 startling and it is frightening to think that is what the
15 government believes is its obligation.

16 The third aspect of classified discovery. The government
17 doesn't understand its basic requirements with regards to
18 classified discovery either. They stated on page seven of their
19 response motion, the fact that--and this is in regards to the
20 ENCASE images. The fact that these hard drives were collected from
21 a classified facility, namely a SCIF, confirms that the rules of
22 production; again, they are looking for production, not discovery;
23 under M.R.E. 505 should govern whether these images are

1 discoverable. Again, the government mixes up discovery with
2 production.

3 MJ: And these are defense files--or these are Defense
4 computer images?

5 CDC[MR. COOMBS]: Just simply a request. Yes. If the
6 government doesn't wish to----

7 MJ: I mean the Department of Defense. They are controlled by
8 the Department of the Defense?

9 CDC[MR. COOMBS]: That is correct, Your Honor.

10 If the government doesn't want to or doesn't wish to turn
11 over specifically requested items under R.C.M. 701(a)(2) or the
12 ~~Brady~~ under R.C.M. 701(a)(6), they have to go through the correct
13 procedures under M.R.E. 505 to do that. They can't just simply
14 say, "Classified. Denied." And that is what they've been doing.
15 Classified. Denied. They haven't been saying, you know what? We
16 gotcha. That is that you've asked for a specifically requested
17 item. We're going to--we understand our obligation to turn that
18 over. However, we're going to assert a privilege over it under
19 M.R.E. 505(f); or we're going to ask the Judge under M.R.E. 505(i)
20 to look at it and determine whether or not it really is something
21 that would qualify under R.C.M. 701(a)(2). Or we are going to
22 voluntarily disclose it under M.R.E. 505(f) but we want to do
23 alternatives to the disclosure that we believe would be more
24 appropriate. That is the correct procedure to go through. The

1 government doesn't do that because they don't seem to understand
2 that.

3 Instead they ignore the very clear mandates within our
4 military justice system that start off, really, taking the
5 Constitution, going to Article 46, which gives very broad rights of
6 equal access to witnesses and evidence to the accused.
7 Implementing Article 46 statutory requirements into the R.C.M.
8 701(a)(2) and (a)(6) requirements. Taking that and giving the
9 defense the ability to actually prepare its case in advance of
10 trial, not at the eve of trial by withholding----

11 MJ: Well, the case was just referred.

12 CDC[MR. COOMBS]: That is correct, Your Honor; but we've
13 been in discovery for 2 years.

14 MJ: When is discovery due?

15 CDC[MR. COOMBS]: Well----

16 MJ: Under R.C.M. 701(a)(2)?

17 CDC[MR. COOMBS]: Yes. Prior to arraignment or right at
18 prior to arraignment. Yes, Your Honor. But that--again, if that
19 is--when you take a look at the Rule, the Rule is the government
20 shall provide this; and our theory of how we view discovery is that
21 it is open, it's broad, it's liberal. Technically under the Rule,
22 you could hold everything in discovery, right before arraignment,
23 and yes, lay it at the defense's feet.

1 MJ: But if they want to challenge it, there is no Military
2 Judge in the military justice system until referral, is that
3 correct?

4 CDC[MR. COOMBS]: Well that is totally correct. If their
5 response to that motion cited the correct law, then we could have
6 confidence and faith that that is their position. But it is not.
7 Their position is that you haven't established under R.C.M. 703
8 relevance and necessity. And when you take a look at some of
9 their responses of gamesmanship that--that they appear to be
10 engaging in, the government repeatedly states, "The defense has not
11 stated with enough specificity what they are asking for from a
12 particular organization." Then in the same breath they state,
13 "and you haven't--We believe it is not relevant and necessary." So
14 how can you say that you don't have enough specificity to know what
15 we're talking about; and then 2 seconds later say and we also don't
16 believe it is relevant and necessary. On page 8, they use the word
17 'alleged damage assessments'. The government very well knows that
18 these exist and yet they say alleged. On page 11 with regards to
19 the Department of State, they state that the Department of State
20 has not completed its damage assessment. The defense looks at this
21 and it appears the government may be playing a little fast and
22 loose with the word 'completed' but that is not their obligation.
23 Under R.C.M. 701(a)(2), if it is there and you've asked for it;
24 whether or not in the middle of the stage or not--an interim stage;

1 and in fact the government may even say that damage assessments go
2 on for years, and in fact, we never have a damage assessment ever
3 done. Or we get one done 10 years later. Again, that is just
4 avoiding their discovery obligations that we mandate within our
5 rules.

6 Third, on pages 12 through 14, the United States says,
7 "We are unaware of any forensic result or investigative reports
8 within the named agency." They never state that they looked. They
9 just simply state that they are unaware. The government continues
10 to hide behind the complexity of this case in their words or the
11 difficulty of working or dealing with multiple executive agencies
12 in order to justify its acts. Even if we could overlook that the
13 government does not understand military discovery practice, we
14 can't overlook the impact that that failure to understand has had.
15 The government doesn't understand *Brady*; and how is that even
16 possible that they don't understand their *Brady* obligations. The
17 government doesn't understand the requirements under R.C.M.
18 701(a)(2). And the government doesn't seem to be knowing what it
19 is doing with its requirements for classified discovery. They
20 state in their case management order that if you order any of this
21 discovery, it is going to take 45 to 60 days for them to coordinate
22 with the OCA in order to do the classification review and determine
23 whether or not they are going to assert the privilege. That should

1 have been done 45 or 60 days--that should have been done a long
2 time ago; as soon as we asked for it.

3 They knew we were asking for that item and it is
4 classified, and they say okay, well, you know, R.C.M. 701 is not
5 going to mandate, although we understand our requirements under
6 R.C.M. 701, M.R.E. 505 is going to be the Rule which controls
7 whether or not we have to give this discovery. Well, they should
8 have been coordinating with the OCA. Saying to the OCA, look the
9 defense has asked for something specifically and you have it. You
10 know? We want to know can we turn it over. The OCA then says yes
11 or no. Assert the privilege or not. And then they go from there.
12 They are actually still at the stage where they say if you--if you
13 order, what if even--clearly either *Brady* or R.C.M. 701 (a)(2),
14 they have to go back to the agency to identify any of the equity
15 holders within that; which they roughly estimate is going to be
16 about 45 to 60 days. Then they have to determine whether or not
17 there is a privilege; and then we will have to go through that
18 process. This is all discovery that if the government understood
19 how classified discovery worked, they would have been doing and had
20 done to where they could tell, Your Honor, when you ask if they are
21 going to assert the privilege, they could give you a definitive yes
22 or a no. Not at this time. Something that should have been done
23 in advance. Certainly, when my client is in pretrial confinement.

1 Now I don't know what the government could say in
2 response to this abject failure but they may try to obscure the
3 reality of the situation by saying we provided over 400,000 pages
4 of discovery. Well, there are cases that we've cited that the
5 number of pages of discovery doesn't mean you've complied with
6 discovery obligations. That is certainly alarming when you don't
7 understand *Brady* and you don't understand the correct procedures
8 for specifically requested items, how you can avoid giving them.
9 Either under R.C.M. 701(g) or under M.R.E. 505. They now also
10 point to the fact that just yesterday at 7:35 p.m. we notified the
11 civilian counsel that we dropped off a CD at the defense office
12 with discovery in it. We'd ask that you don't overlook the timing
13 of this. Apparently this discovery deals with various issues, to
14 include impeachment information on Adrian Lamo. Something that
15 would have been timely earlier----

16 MJ: Okay, now remember, I just came to the case.

17 CDC[MR. COOMBS]: I understand, Your Honor.

18 MJ: Who is Adrian Lamo?

19 CDC[MR. COOMBS]: We'll say Adrian Lamo is a witness, Your
20 Honor, in this case that testified at the Article 32. And yet, now
21 they are saying we've got this now impeachable information that
22 we're providing to you.

23 Again, the late timing of this discovery, when you look
24 at the fact that they do not understand their discovery

1 obligations, appears to be just responsive to the defense reply of
2 saying, look you--for 12 pages in your reply to compel discovery
3 motion, you cite R.C.M. 703. For 12 pages in our motion to compel
4 discovery, you rely upon the federal appellate standard of *Brady*
5 and argue that. And you cite *Cone* as your authority for that. If
6 they would have just read, as I say in my reply, the footnote below
7 their cite, they would have seen that even the Supreme Court said
8 look, this is the floor in the federal system, but you, the
9 prosecution have an ethical obligation, probably; or you may have
10 other statutory obligations that are much greater than this. And
11 the floor in the military is not the appellate standard at *Brady*,
12 the floor in the military is R.C.M. 701(a)(6). That's just the
13 floor. Yet, the government doesn't understand that. Discovery
14 must be provided in a timely fashion. And in this instance, the
15 way we do things in the military, we pride ourselves on the fact
16 that we do not play games with discovery. The government--when I
17 was a young trial counsel, my Chief of Justice said to me, "Look
18 you are going to have two files. The file you get from CID or any
19 other investigative agencies; and the file that you keep yourself
20 with your notes."

21 This file over here [holding up papers] should look very
22 similar to the defense counsel's file. In fact, it should almost
23 look identical. And the reason why is we do have open discovery
24 because we don't play games and having to try cases in state and

1 federal, I can tell you that is not the case sadly. And in here,
2 in this instance, that has not been the case sadly. And amazingly,
3 that is because the defense now for the first time, we see the
4 prosecutions response motion, see that they don't understand the
5 rules. There are four CPTs on this case and none of them, not once
6 spot this is a R.C.M. 701 issue and maybe we should be citing
7 R.C.M. 701 in our reply motion.

8 MJ: Let me ask you to articulate the defense position. The
9 government says that R.C.M. 701(f) says, and it does say this, "The
10 rules shall not govern the production of classified information."

11 What do you take that to mean?

12 CDC[MR. COOMBS]: Yeah, and case law will support this out,
13 as well. R.C.M. 701(f) is production of it. R.C.M. 701 isn't just
14 classified. R.C.M. 701 deals with any other privileges that are
15 within M.R.E. 304 or within any of the other privilege series of
16 the 5th Section. So it could be spousal privilege. It could be
17 patient privilege. So it doesn't mandate that you actually give
18 this and then in that instance you would go to, if it is
19 unclassified, to R.C.M. 701(g)(2) and say, Judge, you know, this
20 deals with--a common example.

21 This goes with medical records of an alleged rape victim.
22 It is definitely *Brady* material, or it is definitely something that
23 the defense is specifically requesting, but we're relying upon

1 R.C.M. 701(f) and R.C.M. 701(g) to ask you to not have us hand this
2 over.

3 MJ: Okay.

4 CDC[MR. COOMBS]: With regards to classified then, you would
5 take R.C.M. 701(f) and you would say, all right. You know this
6 jumps us over into M.R.E. 505 land; which again, something I know a
7 little bit about. If you have in your--you are in M.R.E. 505 land,
8 you are going to have to pick where you are going to go. Are you
9 going to assert a privilege? Are you going to voluntarily disclose
10 it and then it is subject to a protective order? Are we going to
11 voluntarily disclose it and ask for substitutions? Are you going
12 to oppose the production of it, not because of the privilege but
13 because you just for whatever reason don't believe it should be
14 provided under M.R.E. 505(i). Then we would go through that whole
15 system to determine whether or not they actually have to give it.
16 But this is discovery land here that we are at now. We are not at
17 the production land at trial.

18 The government's response and the fact that they haven't
19 provided the specifically requested discovery or they've opposed it
20 under the R.C.M. 703 standard clearly indicates, without a shadow
21 of a doubt, that they don't understand the discovery requirements;
22 and also, without a shadow of a doubt, when they cite federal
23 appellate standard for *Brady*, it indicated they do not understand
24 their *Brady* requirements. And here we are now, 2 years, basically,

1 almost into this case. And to go back with a--the ENCASE image,
2 for example. Just to use that for a moment. If the government
3 were to provide the specifically requested discovery to us, they've
4 given classified information to us. They've given ENCASE images of
5 SCIF computers that had my client's user profile on it. If they
6 were to provide that discovery to us today in a timely fashion,
7 like they did with what they wanted to give to us, our computer
8 forensic experts would need, at least, 3 months to go through that
9 information. And that's dependent upon the number of images they
10 provide. And within my motion, I cite that we asked for them to
11 preserve it, but even in the government itself, the CID--well,
12 actually the CCIU, the agency that was investigating this, asked
13 for these images or asked for the computers to be preserved. So
14 they spotted this as a potential source of information.

15 But again, the government has fought that and they
16 believe M.R.E. 505 land is where we are at, but they cite R.C.M.
17 703 as their purpose for that and that is a problem that is going
18 to be very difficult to fix; if it can be fixed.

19 MJ: Okay. Mr. Coombs, I have a few questions for you.

20 To get discovery, the discovery under R.C.M. 701 has to
21 be relevant and material if you're looking--you're not in 'Brady
22 land' if you will. The FOIA requests, what evidence do I have that
23 these are relevant and material?

24 Well, what are you looking for first with the FOIA?

1 CDC[MR. COOMBS]: Well, again, Your Honor, that is going to
2 be going into the ex-parte issues. But when you look at--when you
3 ask for what is specifically requested, you can't ignore that
4 material. When we say material there, that means helpful. So you
5 look at the case law within R.C.M. 701(a)(2) and every case says
6 that's helpful to the preparation of the defense; and they say that
7 that is such an easy thing to get over because it is anything that
8 would be assisting the preparation of the defense. It doesn't have
9 to be relevant. In the case law that I cite, excuse me, it doesn't
10 have to be admissible. In the cases that I cite even say it
11 doesn't have to be helpful from a standpoint of something that the
12 defense would like to hear about.

13 MJ: *United States v. Graner* does not say that?

14 CDC[MR. COOMBS]: Which case, Your Honor?

15 MJ: *United States v. Graner*. It's the most recent *Court of*
16 *Appeals for the Armed Forces Case*.

17 CDC[MR. COOMBS]: Well, see the *Graner* case, they're asking--
18 --they were going basically on a fishing expedition and it wasn't---
19 -

20 MJ: Well that is why I am asking you what is it about these--
21 well, first of all with the FOIA requests, what did the government
22 give you?

1 CDC[MR. COOMBS]: The government gave us what was previously
2 released already. That was the, essentially, the CENTCOM [AR] 15-6
3 investigation into the Apache incident.

4 MJ: And what do you want?

5 CDC[MR. COOMBS]: What I requested was any FOIA requests for
6 that exact same information.

7 MJ: And why is that material to the preparation of the
8 defense?

9 CDC[MR. COOMBS]: Helpful to the defense, Your Honor. And
10 the helpful aspect to that, if we are going to have to say it here,
11 it would be something that would assist in our theory of the case;
12 and our presentation of that theory it would assist. I could go
13 into more detail, but I would like to do that ex-parte. But that,
14 again, when you look at, and I ask that the Court look at the cases
15 and even the *Graner* case. Look at what is the requirement under
16 R.C.M. 701(a)(2) and what the standard is.

17 MJ: Well if the defense counsel comes ex parte and then tells
18 me it is going to be helpful to my case, and I don't have any facts
19 in addition to that, everything is discoverable.

20 CDC[MR. COOMBS]: No. In this instance when you state a
21 specifically requested item and maybe we will just go to the
22 easiest----

23 MJ: Well, every specifically requested item is discoverable?

1 CDC[MR. COOMBS]: No, Your Honor. When you go to a
2 specifically requested item, again, you look at this standard, the
3 trial counsel shall, as soon as practicable, disclose to the
4 defense the existence of evidence known to the trial counsel which
5 reasonably tends to negate guilt, reduce guilt, or reduce punishment; the
6 *Brady* standard. With regards to the specifically requested items,
7 then the--it is not a high standard. The trial counsel will
8 provide any information that is helpful to the preparation of the
9 defense. Under this standpoint, all the case law says that it just
10 has to be something that would help them prepare their defense. To
11 know whether or not we should explore, let's say for example, a
12 pretrial agreement or not. Or knowing whether or not we should
13 explore a particular theory of defense or not. When you ask for
14 the specifically requested items, that is why the requirement or
15 the burden on the government goes up. Because you've identified
16 exactly what you are asking for; and oftentimes where it can be
17 found.

18 CDC[MR. COOMBS]: And the issue here isn't where we have to
19 then articulate to you, the Court, why that is helpful to the
20 defense. The issue is---

21 MJ: You do if you want me to compel the discovery.

22 CDC[MR. COOMBS]: Well, this is what happens, Your Honor.
23 The government then is in the position of saying they've asked for
24 something specifically, they've identified it, we're going to hand

1 it to them. Or, and when you take a look at how this is supposed
2 to review, the review for R.C.M. 701(g) standard, then they have to
3 oppose. And when we talk about R.C.M. 701(g) standard, what
4 happens is that 'in-camera' review, you would look at that
5 information. And time-and-time again, C.A.A.F. has reversed Judges
6 for looking at the information not through the defense in the
7 preparation of its case; preparing for its case; but using the
8 production standard, the relevant and necessary standard. The
9 cases that we cited you to indicate that the better practice for
10 the Court, if in fact, the government looks to get excused from its
11 obligation under R.C.M. 701(g) is for you to then 'in-camera' bring
12 the parties back, look at the items, and have the--if it is not
13 clear just from looking at the items, then we would say that
14 majority of the stuff, once you got it, it would be clear. But if
15 it is not, then at that point the defense would say to you, if in
16 fact, you don't readily see that this would be helpful in the
17 preparation of the defense, the defense could indicate to you why
18 it would be helpful. But the step isn't; and this is what's
19 happened here because they don't understand the rules----

20 MJ: Let me just make sure I understand your position.

21 Your position is you have to make absolutely no showing
22 of relevance to me?

23 CDC[MR. COOMBS]: My position is--no. My position is when I
24 requested specifically under R.C.M. 701(a)(2), the government has

1 to produce it if it is within their custody or control; or if the
2 government looking at it says, they are out to lunch. That this is
3 nothing that has to do with this case. They would go to you under
4 R.C.M. 701(g) saying no. We don't believe that that is applicable.
5 Then, and you can see that most readily, so I will use an example
6 because that makes it easier. The defense asked in a rape case, we
7 want the mental health information of the alleged victim. We
8 believe she went to talk to Dr. Jones. We want that information.
9 We've asked for it specifically. We've identified it. We don't
10 have to state to them the relevance and necessity of it. They then
11 have a choice. Turn it over or seek under R.C.M. 701(g) for you to
12 say it is not relevant, not necessary or what not. Actually, that
13 is not the standard. Just not helpful to the defense. It's not
14 relevant.

15 MJ: And that is the case law on mental health records; yes.

16 CDC[MR. COOMBS]: Exactly. Well, that is the case law in
17 any of the specifically requested discovery; because then what
18 happens when you get to the R.C.M. 701(g) land, then if you look at
19 it and you are looking and you readily see, yeah, this is helpful,
20 you give it. You order the discovery. If you don't believe it to
21 be relevant or helpful, then you would ask the defense at that
22 stage why do you think this is relevant and helpful. Then we would
23 say to you why and then you would either order it or not based upon

1 that. But what we don't do is we don't just simply go from the
2 R.C.M. 701(a)(2) land all the way to the R.C.M. 703 land.

3 MJ: I understand that piece. Now the concern--what you're
4 basically arguing to me is you can ask the government for anything
5 you want from any agency of the government----

6 CDC[MR. COOMBS]: No, Your Honor.

7 MJ: ----and they have to go and get me a R.C.M. 701(g)
8 review.

9 CDC[MR. COOMBS]: No, no, Your Honor. No. Let's go to the
10 Rule real fast and I will read the exact limitation within the
11 Rule. And case law that we cite in our ruling makes this
12 abundantly clear.

13 When you look at R.C.M. 701(a)(2), "After service of
14 charges upon request by the defense, the government shall permit
15 the defense to inspect;" and then it's the, "Any books, papers,
16 documents, photographs, which are within the possession, custody or
17 control of military authorities;" so that is going to be the first
18 requirement.

19 MJ: Um-hmm.

20 CDC[MR. COOMBS]: "And which are material," and the case law
21 which we cite, the material is helpful to the preparation of the
22 defense.

23 MJ: So that's within control of military authorities under
24 that rule?

1 CDC[MR. COOMBS]: Exactly.

2 MJ: Yes.

3 CDC[MR. COOMBS]: Under the----

4 MJ: That's the ENCASE images?

5 CDC[MR. COOMBS]: That's the ENCASE images----

6 MJ: And the FOIA?

7 CDC[MR. COOMBS]: That's the items that we specifically
8 requested.

9 MJ: But not the damage assessments?

10 CDC[MR. COOMBS]: Well, well there you--there's the problem.
11 If the government has them in their custody [or] control, then at
12 that point it is the damage assessments.

13 MJ: No. If the military has it under their control.

14 CDC[MR. COOMBS]: Exactly.

15 MJ: Yes.

16 CDC[MR. COOMBS]: So you've got the Information Review Task
17 Force damage assessments, which is a Department of the Defense task
18 force. You've got publicly stated various agencies working with
19 the Department of Defense in order to look at the damage
20 assessments.

21 MJ: So you believe if an agency is working with the
22 Department of Defense, then things under that agency's control are
23 under military control for purposes of R.C.M. 701(a)(2)?

1 CDC[MR. COOMBS]: You would have the *Williams* issue probably
2 for that--for *Brady*. But under R.C.M. 701(a)(2) it would depend
3 upon, I guess, the extent of the cooperation and whether or not
4 this cooperation, let's say for example, the Department of State
5 is giving information from the DS, the Diplomatic Security, to the
6 Department of Defense and then their records, the Department of
7 Defense has. So in that instance, yes, it would be in the custody
8 and control of the military. So when you make this request, again,
9 they have to--this is not the before arraignment. This is as soon
10 as practicable. They have to provide it. The reason why, for
11 discovery, is when you are asking for this, it doesn't help right
12 at arraignment, it helps when you are doing preparation of your
13 case. That is what all the case law cites and supports. In this
14 instance, we've asked for specifically requested items that are in
15 the control of the military.

16 The obligation then on the trial counsel is to either
17 produce it or to go under R.C.M. 701(g) and; or if it is
18 classified, to go into M.R.E. 505. It is not R.C.M. 703----

19 MJ: Or to deny it then have you file a motion to compel,
20 which you did.

21 CDC[MR. COOMBS]: Right. And then now we are at the stage
22 if they were to respond, saying look, we don't believe that it is
23 helpful under R.C.M. 701(a)(2); or we don't believe it is *Brady*

1 under R.C.M. 701(a)(6). Then we would be at a very different
2 stage.

3 MJ: If you are shifting the burden to them under R.C.M.
4 701(a)(2). Are you telling me you have not relevance and
5 materiality standards to get me to make a motion to compel.

6 Is that your argument to me?

7 CDC[MR. COOMBS]: No, Your Honor. I'll try at this again.
8 What I am saying is, I submit a discovery request; a specific
9 discovery request under R.C.M. 701(a)(2). The government has to be
10 responsive to that discovery request. If their position is if it
11 is a item that is in the control of the military----

12 MJ: Um-hmm.

13 CDC[MR. COOMBS]: ----and it is helpful to the defense,
14 R.C.M. 701(a)(2) mandates that they provide this as soon as
15 possible.

16 MJ: Um-hmm.

17 CDC[MR. COOMBS]: If they don't believe it is helpful to the
18 defense, if they don't believe it is within the custody and control
19 of the military, they can say no. It is not helpful to the
20 defense. We don't believe it meets the requirements under R.C.M.
21 701(a)(2) and then it would be then going to you under R.C.M.
22 701(g) saying, we don't believe this is appropriate discovery under
23 R.C.M. 701(a)(2). Then, I would be in the position of having to
24 tell Your Honor why I believe it is helpful to the preparation of

1 the defense. But we can't lose sight of the fact that that is not
2 what the government has done in this case. The government hasn't
3 come back with we don't believe it is appropriate under R.C.M.
4 701(a)(2). They haven't sought under R.C.M. 701(g) to be protected
5 from their discovery obligations. Instead, what they've done for
6 12 pages in their motion, is relied upon inapposite law, federal
7 law and the wrong Rule for Courts-Martial. They are literally on
8 the wrong page of the Manual for Courts-Martial. And that,
9 unfortunately, has consequences because as the government has said
10 itself, they've been doing this *Brady* search under the wrong
11 standard for basically, the last 2 years. The only way you can fix
12 this is for them to go back and re-do their *Brady* search under the
13 right standard. Not with the federal appellate standard but with
14 R.C.M. 701(a)(6).

15 The discovery that we asked for under R.C.M. 701(a)(2)
16 was needed at the time, as soon as practicable, at the time that we
17 asked for it. They should have responded appropriately under
18 R.C.M. 701(a)(2) by providing it or by informing us that they
19 believe it was not helpful or not relevant to the defense; and then
20 stating they were going to seek from you under R.C.M. 701(g) the
21 authorization not to provide it.

22 MJ: Which they couldn't have done until the case was
23 referred.

1 CDC[MR. COOMBS]: Exactly. So had they in their reply
2 motion said to you, ma'am, we don't think that this is relevant or-
3 -excuse me, helpful under R.C.M. 701(a)(2) land and we are going
4 to--for you to take a look at it under R.C.M. 701(g). Then we
5 could have confidence that they knew what they were doing. But we
6 can't ignore the elephant in the room here; and that is that they
7 don't understand discovery within the military system because they
8 don't cite the right rule. For 12 pages they don't cite the right
9 rule. That is not a mistake. That is intentional and for 12 pages
10 they missed both the correct standard for *Brady*, which is alarming;
11 and then they miss the fact that this is R.C.M. 701(a)(2) land and
12 not R.C.M. 703 land.

13 So it appears--not even appears, it is clear that they've
14 been operating under the standard of you would have to show to us
15 it is relevant and necessary before we provide it to you; which is
16 the production standard at trial. And the rule they rely upon,
17 R.C.M. 703(f), that is not a rule the government could ever invoke.
18 Ever invoke. R.C.M. 703(f) is for the record custodian keeper of
19 that. R.C.M. 703(f) assumes that Your Honor has already made the
20 determination that the information is relevant and necessary.
21 R.C.M. 703(f) is where the records custodian says to Your Honor it
22 is too burdensome for me to provide this for the following reasons
23 and I want to be relieved of my obligation. In which case,
24 usually, that is due to a subpoena being issued for that record.

1 So the very rule that they cite under no circumstance could the
2 government trial counsel use to avoid discovery, for one. And if
3 we were, in fact, in the production land, they could never cite
4 that rule for the trial counsel. It is only the evidence custodian
5 that would be citing that rule; and that would be after Your Honor
6 has already made the determination of relevance and necessity. So
7 they missed the ball completely on this. So now we are at a very
8 late stage in this game and the defense has not had the required
9 discovery that we've asked for. We haven't had the benefit of
10 Brady. We've gone now over 2 years with them operating under the
11 wrong rules.

12 So what Brady information was lost? What Brady
13 information is no longer in existence? What information that we
14 have specifically asked for that the government is holding on to
15 that we actually needed in the preparation of our defense now? And
16 even if they were to today to say, you know, Your Honor, we're
17 going to hand over the 3 million documents we have. We're just
18 going to give them to them. We would need at least the 6 months to
19 a year to review that stuff to understand what's in there. To
20 understand how that would impact our case; and that is the whole
21 point of discovery. As soon as practicable, give the items. We
22 have an open discovery system. We have a liberal discovery system.
23 And the trial counsel either willfully or very unfortunately under
24 a--just gross negligence, has not understood its basic discovery

1 requirements; and there are 4 Captains that missed the boat on that
2 completely. Not even the right ball park.

3 MJ: Okay. Mr. Coombs, I understand your argument. I have
4 it. I am going to ask my questions one more time for:

5 A - the FOIA request regarding video in specification 2
6 of charge II.

7 What is the evidence that I have that that is material or
8 favorable to the defense?

9 CDC[MR. COOMBS]: Your Honor, this would be a R.C.M. 701(g)
10 discussion that we would be having at this point.

11 MJ: No. I don't agree with you on that. I think the defense
12 in order to do----

13 CDC[MR. COOMBS]: What would be required----

14 MJ: ----what you're doing now in an R.C.M. 906(b)(7)
15 discovery motion for appropriate relief to compel discovery. I am
16 asking you--I believe you have to articulate relevance and
17 materiality for me to order the government to compel production;
18 but if you disagree, that is fine. You've made your record.

19 CDC[MR. COOMBS]: Well, Your Honor, I----

20 MJ: But would you like to submit something or at least tell
21 me what to look for that says that this evidence is relevant and
22 material or favorable.

1 CDC[MR. COOMBS]: To make sure I understand Your Honor at
2 this point, are you saying production from the standpoint of
3 production in R.C.M. 703 land?

4 MJ: No. I am saying discovery.

5 CDC[MR. COOMBS]: Okay.

6 MJ: In order for me to compel discovery.

7 CDC[MR. COOMBS]: Discovery. All right.

8 MJ: Just the fact that you ask for it doesn't mean, oh, you
9 can have anything that you want. I don't agree with. You have to
10 show me something that shows that it is relevant for you.

11 CDC[MR. COOMBS]: That is it helpful to the defense, yes?

12 MJ: Yes.

13 CDC[MR. COOMBS]: Under R.C.M. 701(a)(2). Yes. I don't
14 disagree with that, Your Honor. And in this instance----

15 MJ: But for what is it with the FOIA--what do you not have--
16 you want the FOIA requests.

17 Is that correct?

18 CDC[MR. COOMBS]: That is correct, Your Honor.

19 MJ: You stood up twice when he said FOIA requests.

20 TC[MAJ FEIN]: Ma'am, just to try to make this a little bit
21 more efficient, we have produced the FOIA requests. He received it
22 last night. We finally received it and gave it to the defense.

23 MJ: Is that true?

24 TC[MAJ FEIN]: They have the requests----

1 CDC[MR. COOMBS]: I don't know if that happened, Your Honor.

2 TC[MAJ FEIN]: ----and they have the response.

3 CDC[MR. COOMBS]: This is----

4 TC[MAJ FEIN]: That is--just trying to stop this line----

5 MJ: Okay.

6 CDC[MR. COOMBS]: This would go back to then, you know, this is
7 something we have been asking for for quite some time.

8 MJ: I've got that.

9 CDC[MR. COOMBS]: So if, in fact, it showed up at 7:35 last
10 night or sometime yesterday, I don't know.

11 MJ: Okay.

12 MJ: So the government is telling me that they've given it to
13 you. So if you would then, after we recess today or break, take a
14 look at that. If you don't agree, certainly, feel free to re-raise
15 it. The government, as an officer of the court, is telling me they
16 gave it to you.

17 CDC[MR. COOMBS]: Yes, Your Honor.

18 MJ: So let's move on then to the Quantico video. The
19 government tells me it doesn't exist.

20 Do you dispute that?

21 CDC[MR. COOMBS]: Well, the government has indicated that
22 they provided the Quantico video, we would dispute--yes, that it
23 doesn't exist. The Quantico issue opens up other issues of how my
24 client was treated while----

1 MJ: I understand that.

2 CDC[MR. COOMBS]: ----and we believe the video captures
3 that. So we believe the relevancy of it would be that it, in fact,
4 goes----

5 MJ: Does it exist or doesn't it exist is what I'm--I guess my
6 first question.

7 CDC[MR. COOMBS]: We believe yes, it does exist, Your Honor.
8 And we have that good faith basis based upon my client being there
9 being videotaped at the time that this was happening. Now the
10 government has said that we were provided with 2 videos and we have
11 those 2 videos; and those are videos after the event started to be
12 videotaped.

13 CDC[MR. COOMBS]: So, yes, we would say we were not provided
14 the correct video, Your Honor.

15 MJ: All right. Now I don't have any evidence of that.

16 Do you want to present any evidence of that for a limited
17 purpose?

18 CDC[MR. COOMBS]: We can, Your Honor. Not at this very
19 moment, but we could. Yes, for the limited purpose of the motion.

20 MJ: Okay. Captain Fein, that is your response, right?

21 The government's belief is that what the government's
22 responded is that video doesn't exist.

23 TC[MAJ FEIN]: Yes, ma'am.

1 MJ: And you've provided the defense with every video that
2 does exist?

3 TC[MAJ FEIN]: Only 2 videos existed, ma'am. The defense has
4 been in possession of them and the multiple sworn statements now
5 signed documents that states that ultimately, that video does not
6 exist or didn't exist.

7 MJ: Okay. I have 2 proffers. If either side wants to
8 present evidence on that, we certainly can; but I cannot order
9 something to be produced that the government claims doesn't exist.
10 If it does exist----

11 CDC[MR. COOMBS]: And again, Your Honor, what we could do is
12 call my client for the limited purposes of the motion in order to
13 establish the factual predicate you would need to have the
14 defense's good faith for the request.

15 MJ: Now let's go on to the ENCASE forensic images.

16 CDC[MR. COOMBS]: Yes, Your Honor.

17 MJ: What is the relevance, materiality, or favorability of
18 that?

19 CDC[MR. COOMBS]: We believe under R.C.M. 701(a)(2) the
20 material being helpful to the preparation of the defense is that
21 these other computers or computers of other 35Fs, intelligence
22 analysts who worked in the SCIF, is a common practice for them to
23 supplement their machines with other programs that would assist
24 them. In fact, during the Article 32 testimony, which Your Honor

1 is not aware of, many of the witnesses indicated that they added
2 mIRC chat, which is a program and he is not charged with that; but
3 added other software to a system or their DCGS computer. The
4 common practice, and we believe that, if we had the ENCASE images
5 it would show that the common practice within the unit was, in
6 fact, to add various programs that were not authorized from a
7 technical standpoint, but were authorized from a command mission
8 essential standpoint. 'Wget' was one of them.

9 CDC[MR. COOMBS]: So we believe that the charged program, in
10 this case that the government has said my client without
11 authorization added to his computer, would be found on other
12 computers that did not have my client's user profile.

13 MJ: Now what evidence do I have of that? You said people
14 testified at the [Article] 32.

15 CDC[MR. COOMBS]: Your Honor, again, at this point, the
16 helpful to the defense standpoint for the compelling the discovery,
17 even at the R.C.M. 906 standpoint, is would it helpful to the
18 preparation of the defense to have this. The ENCASE images, the
19 evidence you would have is, if we want to go to the Article 32
20 record to show that various witnesses said they added mIRC chat.
21 In fact, one witness, his direct supervisor said I had your client
22 add mIRC chat to my computer. Mr. Milliman, who is the computer
23 representative; the computer is called DCGS-A, Distributed Common
24 Ground System-Army, would say that was an unauthorized adding of

1 the software. So you have replete within the Article 32 record,
2 examples of that. But again, here, this is not a relevancy
3 standpoint of having the information be admissible. R.C.M. 701----

4 MJ: I understand that.

5 CDC[MR. COOMBS]: Okay. So R.C.M. 701(a)(2) is just would
6 this be helpful to the defense.

7 CDC[MR. COOMBS]: We believe having these ENCASE images,
8 which we requested time and time again, would be helpful to not
9 only verify the testimony we heard at the [Article] 32, but also
10 verify this exact program; and that is why we asked in the bill of
11 particulars, how they say the program was added. We believe it
12 would be common to see on all the other computers, 'Wget' as an
13 executable file on the desktop. Not added as a software to the
14 computer. But just being a file like you would add a Word document
15 that when you click on it, then it works; but it is not added to
16 the actual program. You don't need user authorization to put it on
17 the desktop. If we had that we'd be able to take that evidence and
18 show that he had authorization in order to put that program on. It
19 would be direct defense to the charge.

20 MJ: Okay. Walk me through that again.

21 So the fact that other people in the unit have that
22 program or other programs?

23 CDC[MR. COOMBS]: That program and other programs; and the
24 fact that it was done by the direction of the S-2, and the OIC, the

1 officer in charge, and the main intelligence analyst; saying that
2 our DCGS-A machine does not have all the programs that we need in
3 order to do our job effectively. It is mission essential that we
4 add this other software. Mr. Milliman, the individual who is the
5 civilian who is responsible for the DCGS-A machines said that that
6 was common.

7 CDC[MR. COOMBS]: That every unit believed that these
8 computers are their computers and they can add to them. Then he
9 said--he would say that no, you couldn't.

10 MJ: And this is testimony that was presented at the Article
11 32?

12 CDC[MR. COOMBS]: Yes, Your Honor.

13 MJ: The Court would find that very helpful if you would like
14 to give that to me.

15 CDC[MR. COOMBS]: And the defense would find it very helpful
16 if we had a verbatim transcript, but we don't. So if we had it, I
17 would have definitely appended that to the motion.

18 MJ: Is there a summarized transcript?

19 CDC[MR. COOMBS]: No, Your Honor. Not from the standpoint
20 of specificity. There is a summarized transcript that the IO
21 relied upon, yes; but not to the specificity that you would
22 probably need. But we certainly could take Mr. Milliman's
23 testimony; and that is clear; and we could take Captain Fulton's

1 testimony, which is the OIC of my client who directed him to add
2 the software to her computer.

3 MJ: That's fine and if you want me to listen to certain parts
4 of the tapes, I am happy to do that as well.

5 CDC[MR. COOMBS]: Very well, Your Honor. And so we would
6 ask that that be done. That either--to not require the court
7 reporter to transcribe other materials, but to at least, pull the
8 relevant audio files for those witnesses and then we could cue them
9 up.

10 MJ: Well, before we do that, government, do you dispute that
11 these witnesses said that?

12 TC[MAJ FEIN]: Yes, Your Honor. We do. Actually all of the
13 witnesses at the Article 32 said they did not know what the program
14 'Wget' was; and that 'Wget' was not a program that was authorized.
15 In fact, Mr. Milliman, the contractor for this program said he
16 didn't know what it was until this case. He is the one that is
17 supposed to know what is and what is not authorized on the
18 computers.

19 MJ: How lengthy is the testimony of these particular
20 witnesses from the Article 32?

21 TC[MAJ FEIN]: Unfortunately ma'am, Mr. Milliman's, I would
22 estimate probably about 30 to 45 minutes total. Captain Martin
23 [married name, Fulton] and everyone else that were in the chain of
24 command that would have been the ones properly to authorize under

1 the defense's theory, probably about 1 hour in length. But once we
2 cut down that portion, probably only a few minutes ma'am. The
3 defense has copies of the audio, as well. They'll present
4 evidence.

5 MJ: All right. I'll listen to it.

6 CDC[MR. COOMBS]: And again, in this instance though the
7 ENCASE images, even if those ENCASE images for argument's sake
8 didn't have mIRC chat on them; or even if the ENCASE images didn't
9 have--if they had no unauthorized software, which we believe based
10 upon the testimony that it does, then this would be helpful to the
11 defense because, again, if the defense is command authorization,
12 this would be information under R.C.M. 701(a)(2) that the trial
13 counsel is required, soon as practicable, to provide. So----

14 MJ: Why?

15 How is it relevant if it has no additional software on
16 the computer?

17 CDC[MR. COOMBS]: Well for the other--when we are saying
18 that other people have added software on the computer, we do have
19 testimony. Contrary, I don't know how the government can say that
20 witnesses haven't said, and maybe they are just referencing just
21 mIRC chat--or excuse me, 'Wget' for that; the witnesses said, "Yes,
22 I added mIRC chat to my computer."

23 MJ: What is mIRC chat?

1 CDC[MR. COOMBS]: mIRC chat is a program that allows for
2 internet--it is called internet relayed chat program. And it is a
3 particular version, Mr. Milliman said, was authorized but what
4 happened was it was authorized only after he was aware that people
5 were putting it on their computer. But that authorization was
6 limited to that version. The common practice that he testified
7 would be that people would add later versions that were not
8 authorized; and Captain Casey Fulton testified that my client, at
9 her instruction, added a later version onto her computer. So that
10 one example there would be information that is helpful to the
11 defense. We believe that that is clearly on the ENCASE images and
12 that is why we have asked for them. That is why we asked for them
13 to be preserved and provided.

14 MJ: Okay. I guess I am seeing how hers would be helpful.
15 How would were there a hundred and--how many of those ENCASE images
16 are there?

17 CDC[MR. COOMBS]: No, ma'am. There are not a hundred.
18 These are just the people within the T-SCIF. So we are talking in
19 the neighborhood of 25, at most. Maybe 30 computers from that time
20 period. Now there are a grouping of over a hundred computers that
21 apparently were pulled in from the entire BCT.

22 MJ: So what are you specifically asking for?

23 CDC[MR. COOMBS]: Specifically asking for other computers
24 within the T-SCIF and the TOC being from the S-2, basically

1 personnel to show that within the S-2 it was a common practice to
2 add software that you believe was mission essential.

3 MJ: So from when to when?

4 CDC[MR. COOMBS]: From the very beginning of the deployment.
5 So it would be, basically, in the October time frame, to the end of
6 the deployment for their unit.

7 MJ: October time frame of?

8 CDC[MR. COOMBS]: Of 2009.

9 MJ: To when?

10 CDC[MR. COOMBS]: To eight--well, probably for us what would
11 be relevant is to the time frame of when my client was no longer
12 within the T-SCIF. So that would be in May of 2010.

13 MJ: And you are saying that this is approximately 25?

14 CDC[MR. COOMBS]: Within the T-SCIF, yes. Approximately 20
15 to 30 computers in the T-SCIF and TOC.

16 MJ: Okay. Anything else with the ENCASE forensic images?

17 CDC[MR. COOMBS]: Well, again, if we were at the--the
18 defense's position on this is that the government should have
19 produced this a long time ago or sought some----

20 MJ: I understand that.

21 CDC[MR. COOMBS]: ----protection from you under R.C.M.
22 701(g).

23 MJ: I understand that.

1 CDC[MR. COOMBS]: Very well. Nothing else on that, Your
2 Honor.

3 MJ: Okay, let's move on to the damage assessments. You
4 pointed me earlier to Articles that you had. Let's go through each
5 entity itself then tell me what is the relevance and materiality
6 and favorability of those?

7 CDC[MR. COOMBS]: Well, again, Your Honor, what would be
8 helpful to the defense in our preparation would be to have those
9 damage assessments so that we would know what the damage
10 assessments said.

11 MJ: Okay. What is the evidence? I mean, what are you
12 relying on that it would be helpful?

13 CDC[MR. COOMBS]: Sure. Well, it could be helpful in either
14 one of two ways. Either the damage assessments say what we believe
15 they do say and that there hasn't been any compromised of sourcing
16 methods; that minimal damage, if any, and therefore, obviously,
17 that is very helpful to the defense.

18 MJ: So you are looking for sentencing?

19 CDC[MR. COOMBS]: Well, that could be sentencing, yes. Or
20 it could be just the opposite. Maybe it says oh, this is very
21 terrible. It did 'x', 'y', and 'z'; in which case that also would
22 be helpful to the preparation of the defense. What R.C.M.
23 701(a)(2)----

24 MJ: For sentencing?

1 CDC[MR. COOMBS]: For sentencing or even for the merits.

2 MJ: How?

3 CDC[MR. COOMBS]: Well for the merits standpoint, let's go
4 with if it is not helpful--or actually if it is helpful to us from
5 the standpoint of no harm whatsoever. There is a requirement under
6 R.C.M. 793(e) to prove that the information could cause damage.

7 When you look at the R.C.M. 793 element there, and we
8 cite it within our motion, the *Diaz* case, which indicates
9 classification determinations in and of themselves are not
10 determinative on that issue. Classification determination is just
11 simply [to] indicate how information must be handled. They are not
12 determinative on the issue of whether or not that element is
13 satisfied. The government still would have to provide proof of
14 that. So the government probably would either do that through the
15 OCA or through some other expert witness that they call. The
16 damage assessments, if the damage assessments say what we believe
17 they say would support a position from our expert as to the fact
18 that these things could not cause damage to the United States. So
19 then you would have the issue of the opinion--I don't believe this
20 could cause damage to the United States and then you would also
21 have the actual fact that it did not. So clearly that information
22 then would be relevant if a panel were trying to decide whether or
23 not that element were proven to see not only that you have,
24 perhaps, dueling experts on that very issue, but you have a damage

1 assessment done by the original classification authority
2 indicating, in this case if it were in fact not causing damage,
3 that the defense's expert is probably more attune to the actual
4 risks associated with that information.

5 Or if it were really harmful to us, then, of course, it
6 would be helpful to the defense to know that is not a trial
7 strategy that you'd probably want to go down.

8 MJ: And what----

9 CDC[MR. COOMBS]: And that is exactly what the case is that
10 the defense cites, in a case how R.C.M. 701(a)(2) can be helpful to
11 the defense.

12 MJ: Okay. So your theory is the same basically then for all
13 of the damage assessments?

14 CDC[MR. COOMBS]: Exactly. Yes. And you see with the
15 Information Review Task Force, we also provided to you a letter
16 from Secretary Gates that was made public. In there, Secretary
17 Gates as the Secretary indicates that no sources and methods were
18 compromised from the SIGACT releases. Right then and there, just
19 looking at that, nothing more, you've got clear *Brady* under R.C.M.
20 701(a)(6); but now you've got falling over the hurdle which is all
21 the way to the floor almost of helpful to the preparation of the
22 defense, as issue with R.C.M. 701(a)(2). And again, and I know I
23 beat the dead horse on this, but the issue is at this point arguing

1 the compel discovery, we shouldn't be at this point if the
2 government understood its discovery obligations.

3 So not understanding that, then opens up a whole host of
4 other issues as to what has been missed, what they haven't done,
5 what they should have done, and the timeliness of when they
6 provided this discovery if they understood their requirement. So
7 if you, today, say you know what, I think it is clear, yeah, based
8 upon Secretary Gates' memo that this is R.C.M. 701(a)(6) easy, and
9 R.C.M. 701(a)(2), as well, because they've asked for it. Provide
10 it. In their case management order, they are going to tell you
11 that they need 46 to 60 days to identify the equity holders; to
12 identify, you know, who has play within this in order to then
13 determine whether or not a privilege will be invoked over this.
14 That is indicative of a much larger problem than just compelling
15 discovery. That is indicative of a complete and utter failure to
16 understand discovery obligations; which the defense would maintain
17 has so adversely prejudiced my client that there is really no way
18 to fix that. Again, without hearing, I guess, the defense--or the
19 government's explanation for their improper citing of *Brady* and
20 their improper understanding of R.C.M. 701 controlling instead of
21 R.C.M. 703. Once I hear that I would know whether or not a motion
22 to dismiss would be appropriate, or some other relief.

23 MJ: Okay, anything else with the motion to compel discovery?

24 CDC[MR. COOMBS]: No, Your Honor.

1 MJ: Okay. All right. Government, are you ready to go or do
2 you need a recess?

3 TC[MAJ FEIN]: Ready to go, ma'am.

4 MJ: Okay. Why don't you start by telling me what is the
5 government's view of the interplay between R.C.M. 701, 703 and
6 M.R.E. 505?

7 TC[MAJ FEIN]: Yes, ma'am. To answer your question, ma'am,
8 the United States absolutely agrees--well, we agree with most of
9 the defense's general analysis that they've just relayed or
10 explained in their written motion on R.C.M. 701 and R.C.M. 703. We
11 are fully aware that a request for discovery does not mean the
12 information is necessarily admissible.

13 MJ: Then why did you write what you wrote in your response?

14 TC[MAJ FEIN]: Here is why, ma'am. Ma'am, the United States
15 has complied with our obligations under R.C.M. 701. For all
16 information within the possession of military authorities and that
17 is not classified. We also recognize that we did jump to R.C.M.
18 703 because as the defense's references, and specifically
19 Lieutenant Colonel Carpenter's aptly points out, the only remedy
20 for the defense if material falls outside of military authority,
21 then R.C.M. 701 doesn't apply; or R.C.M. 701 doesn't apply as to
22 compel discovery--or excuse me. Compel production.

23 TC[MAJ FEIN]: Um----

1 MJ: Well, what is the government's view of *United States v.*
2 *Williams*? What entities do you believe you have a duty to search?

3 TC[MAJ FEIN]: Yes, ma'am. Ah, first, Your Honor, *Williams*
4 interprets R.C.M. 701(a)(6). Of course.

5 MJ: Um-hmm.

6 TC[MAJ FEIN]: And the military's *Brady* provision.

7 MJ: Yes.

8 TC[MAJ FEIN]: Unfortunately we don't get to R.C.M. 701(a)(6)
9 because it is classified information. R.C.M. 701(a) says unless it
10 is privileged or falls under (f), then R.C.M. 701 doesn't----

11 MJ: Hold on just a moment.

12 TC[MAJ FEIN]: Yes, ma'am.

13 [The Military Judge reviewed her materials.]

14 MJ: So you are looking at R.C.M. 701(a)?

15 TC[MAJ FEIN]: Yes, ma'am.

16 MJ: Now this is where the government has me confused.

17 Has the government invoked a privilege under Military
18 Rule of Evidence 505?

19 TC[MAJ FEIN]: No, ma'am. The United States has not invoked
20 the privilege.

21 MJ: Then how is it privileged?

22 TC[MAJ FEIN]: Well, ma'am, M.R.E. 505 is both a privilege
23 rule and a rule of procedure. The Rule contemplates, and ready to
24 point out and explain, of how to handle classified information, the

1 standards for handling classified information, and then if a
2 privilege is invoked by not voluntarily disclosing classified
3 information to the defense, then how to go through that process
4 such as a M.R.E. 505(i) hearing.

5 MJ: So it is the government's position that M.R.E. 505 trumps
6 *Brady*?

7 TC[MAJ FEIN]: No, ma'am. Not at all. The government's
8 position is that if it is classified information, if it is
9 classified information, it falls outside of R.C.M. 701(a)(6).
10 *Brady* is never trumped, Your Honor. The Constitutional rights
11 under *Brady* always apply. Which is why we have always focused on
12 the Constitutional interpretation, the Supreme Court's
13 interpretation of *Brady*; of finding material that is either--well,
14 that is material----

15 MJ: What is the government's view of that? Of *Brady*?

16 What does it require you to do?

17 TC[MAJ FEIN]: Ma'am, I don't even want to cite it
18 incorrectly. Ma'am, we are required through *Brady* and its progeny
19 to do a due diligence search in order to find exculpatory--one
20 moment please, ma'am.

21 [Trial counsel reviewed his materials.]

22 TC[MAJ FEIN]: To search for any information that is either
23 material to guilt or to punishment, irrespective of good faith or
24 bad faith of the prosecution and turn over that material. And then

1 it is further interpreted under *Giglio* and all of the other cases
2 to include impeachment evidence ; but in the end it is exculpatory
3 information or it is material that would tend to negate or minimize
4 sentencing--well, punishment. So it would apply to sentencing
5 information. But R.C.M. 701(a)(6) does not apply to classified
6 information, which is why I started with the United States has
7 complied with its obligations under R.C.M. 701. The one big
8 elephant actually in the room, unfortunately, is that everything
9 the defense has requested that we have not produced in discovery is
10 classified information. Today is the first time we have been in
11 front of the Judge under M.R.E. 505 to even have this discussion.

12 What is your authority that says that classified
13 information--that the government doesn't have to invoke a privilege
14 for M.R.E. 505 to apply and trump R.C.M. 701?

15 TC[MAJ FEIN]: Well, ma'am, first it starts with seven--I
16 start with R.C.M. 701(a). Um, under--R.C.M. 701(a) states, "Except
17 as otherwise provided in subsection (f) of this rule."

18 MJ: Yes.

19 TC[MAJ FEIN]: Subsection (f) states, "Information not subject
20 to disclosure. Nothing in this Rule shall be construed to require
21 disclosure of information protected from disclosure by the M.R.E.--
22 by the M.R.E.s.

23 MJ: I guess that is where I am going.

1 How does M.R.E. 505 protect disclosure of classified
2 information if the privilege is not invoked?

3 TC[MAJ FEIN]: Yes, ma'am. Because it gives the government
4 the option to voluntarily--like--as Mr. Coombs pointed out, to
5 voluntarily disclose information; to disclose information with
6 redactions, [and] substitutions and if the defense doesn't have an
7 issue with, it doesn't require a court to make a ruling. And it
8 goes all the way to the other extreme of the government invoking
9 the privilege whole cloth and then as it is contemplated in the ah-
10 -excuse me, in the 'in-camera' review under M.R.E. 505(i), that if
11 its--if there is an unjust result by which withholding, that the
12 Court could then sanction the prosecution and the government. That
13 is where *Brady* would come in if we are withholding *Brady* material.
14 And the government has never maintained that we were withholding
15 *Brady* material. What we've asked for are is to establish
16 procedures and timelines and guidelines in order to disclose
17 information that we have discovered, if we have, that is *Brady*
18 material, for classified. If it is unclassified material, Your
19 Honor, then absolutely. R.C.M. 701(a)(6) applies. *Williams*.

20 TC[MAJ FEIN]: The *Williams* interpretation if the information
21 is within the possession of--or excuse me. Again, not to misstate
22 it, but the 3 requirements:

23 The files of law enforcement authorities that have
24 participated in the investigation. Very succinct. There are 3 law

1 enforcement entities that have participated in this joint
2 investigation.

3 Next----

4 MJ: And who are they?

5 TC[MAJ FEIN]: Ma'am, it is the U.S. Army CID; the FBI; and a
6 sub portion of the Department of State, Diplomatic Security
7 Services. And the United States has turned over the information.
8 And this is only a search requirement for *Brady* material under the
9 *Williams* and its progeny. But we have turned over in effort to
10 turn over as much information as possible, even classified
11 information. We have turned over that CID case file like in normal
12 open file discovery that we have in courts-martial. We've even
13 endeavored to have the approval from DSS, Diplomatic Security
14 Services, to turn over their file. And we have been working with
15 the Federal Bureau of Investigation to turn over any material that
16 would be pertaining to the accused. But because that information
17 is classified that requires the procedures under M.R.E. 505. That
18 is the first prong, ma'am.

19 The second prong, investigative files in a related case
20 maintain by any entity closely aligned to the prosecution. Our
21 obligation to search for the records, to find *Brady* material, and
22 then turn it over to the defense; if we find it. Then if it is
23 classified, we follow the procedures under M.R.E. 505 to either

1 turn it over in classified discovery; to possibly do a redaction
2 [and] substitution; or to invoke the privilege at that point.

3 And then third, Your Honor, other files as designated in
4 a defense discovery request for a specific type of information for
5 this entity; which they have also asked for within the military
6 authorities, it's unclassified. But it's only, again, for any
7 material that is *Brady* material as interpreted through *Williams* and
8 other cases. And again, we have complied with R.C.M. 701. The
9 issue comes up is for the classified information. It is for
10 information outside of military authorities that they have asked
11 for and information within military authorities that is classified.
12 Which is everything remaining that we have not produced in
13 discovery to the defense.

14 MJ: So you've waited through referral so there is a Judge on
15 the case, then you can work through M.R.E. 505?

16 TC[MAJ FEIN]: Ma'am, that is precisely it. We even have a
17 proposed procedure because, unfortunately, M.R.E. 505 as you read
18 it, has an unfortunate void in it. And that void is it doesn't
19 have a gate keeper function that is built in; as in R.C.M. 701 and
20 R.C.M. 703 do in order to allow a Military Judge to make some
21 preliminary rulings on relevance before we either have to invoke a
22 privilege or we have to turn over something whole cloth. The
23 problem with that is, as we've explained in the case management
24 order supplement is that when you are dealing with voluminous

1 classified material it would be almost impossible to answer every
2 response of the defense for classified information without, at
3 least, having some mild form of relevancy determination. So we
4 offer--and that is why we focused, unfortunately, without
5 mentioning M.R.E. 505 and proposing this procedure in our reply--
6 excuse me, in our response, that you, Your Honor, follow a relevant
7 and necessary standard. The same as in R.C.M. 703 to determine--
8 first, make a determination whether the material is relevant or
9 necessary because if it's not, the classified material, then there
10 should be no reason for the United States to attempt to use the
11 processes in place to pro--I guess to----

12 MJ: Why do I have to make a necessity determination on
13 evidence? So you are saying that none of this evidence that you
14 believe, like the damage assessments, for example, are *Brady*
15 material?

16 TC[MAJ FEIN]: Ma'am, I do not have the authority to answer
17 that question.

18 MJ: Why not?

19 TC[MAJ FEIN]: Because it is classified information. For what
20 we have a review.

21 MJ: Okay. Is that the same case for the ENCASE imaging?

22 TC[MAJ FEIN]: No, ma'am. I could--we could absolutely go
23 through all of the items. Ma'am, for the ENCASE images, this
24 information is within the control of the military authorities, but

1 it is classified. So we would argue, first the defense has not
2 provided any evidence to support their request. So they haven't
3 even met the burden of proof. Um, second----

4 MJ: Are you--what burden do they have to meet?

5 TC[MAJ FEIN]: Well, ma'am, they, at least, give some factual
6 showing to support their materiality issue if, if we follow the
7 R.C.M. 701 standard. But as we've maintained because these images,
8 these computers, their purpose for to be in the TOC and SCIF, they
9 are classified. The ones that have been preserved have been
10 classified. The total number, Your Honor, is actually 14 drives is
11 what we would argue are at play right now. The reason----

12 MJ: 14?

13 TC[MAJ FEIN]: 14 total drives.

14 MJ: Okay.

15 TC[MAJ FEIN]: And the reason it is 14 is because the unit
16 redeployed in July--between July and August of 2010. CID did their
17 initial investigation downrange and then once the unit redeployed,
18 they went back to Fort Drum and reviewed all of the other drives
19 that were pulled, is in 2010. [The drives] were pulled from the
20 conexes during redeployment. During that they were searching using
21 their criteria, any hard drive that would have the profile
22 'Bradley.Manning' on it as their criteria. Any of those drives,
23 they collected and they brought back to CID. After that, the unit
24 was free at that point to discard the drives, post-deployment,

1 reset, D-X, all the different procedures that happen post-
2 deployment. What CID did and the defense has provided you and the
3 government in a request said any additional drives that you come
4 across, you need to notify us as part of the active law enforcement
5 investigation. That was in September of 2010. The defense
6 submitted a preservation request in September of 2011. A year and
7 2 months after a unit redeployed from combat. At that point, we--
8 we--we acted immediately on the request. We figured out the 4
9 entities that it would apply to. The unit downrange that keeps,
10 U.S. Army Central Command, that keeps all theatre deployed
11 equipment. We notified CID. We notified the FBI. And we notified
12 2/10th Mountain. After everyone preserved the information and were
13 able to go through it, at that point, they were able to identify at
14 Fort Drum a box of 181 hard drives in the SCIF that they've kept
15 for historic purposes.

16 And out of those, based off the serial numbers and what
17 CID did a year before, they were able to identify 13 hard drives
18 that were in the TOC or SCIF. So there was a box----

19 MJ: From the period of October 2009 to May of 2010?

20 TC[MAJ FEIN]: No, ma'am. Not even to that. It's just that
21 they could identify were in the TOC or SCIF when the unit was
22 deployed because without a extensive examination of the drive they
23 couldn't tell how long it was used or who used it. All CID
24 originally did was look for the profile 'Bradley.Manning'. So

1 those are 13. CID and their--in their evidence collection room has
2 one other drive that we have not given to the defense because it
3 did not have his profile and we would argue is not relevant and
4 necessary because it is classified information. These drives were
5 used in the TOC and SCIF as classified drives. In order to produce
6 them they would have to be reviewed by the different original
7 classification authorities that have equities involved in them and
8 the authority would have to be granted by them to turn it over to
9 the defense. What we would ask and what we propose is that based
10 off the defense's, at least' alleged showing of proffer evidence,
11 that you make an initial determination because it is classified on
12 whether it is relevant and necessary. Then if it is, we will--we
13 will interject and get the machine moving to review these drives
14 and get the approvals, hopefully, to turn them over, invoke the
15 privilege, or follow the rest of the procedures in M.R.E. 505.

16 But for these forensic images, the United States has
17 maintained since the original request of the defense that they have
18 not provided proper authority or the proper legal basis or factual
19 basis. This is to us, to the prosecution, to the government is a
20 simple fishing expedition. It is the--it is trying to find
21 unauthorized software on other computers and the theory that was
22 alleged today, to disprove that the accused had the authority.
23 Well the computer doesn't show that. It's the individuals. It's
24 asking the chain of command members did anyone have the authority

1 to use 'Wget'. If the answer is yes, it's solved. We don't have
2 to turn over classified information needlessly. If the answer is
3 no, then that answers the question. There was no authority to use
4 'Wget'. The defense is trying to, I think, confuse the issues with
5 mIRC chat; a different program that the accused is not alleged to
6 even use as part of this case; not to say he did or didn't. It's
7 not a part of the charges. There was testimony that we can
8 provide, as well, at the [Article] 32 as I mentioned before that
9 discusses mIRC chat and how the Division put out a requirement, the
10 authority to use that program and people installed it on their
11 computers. But it doesn't mean that 'Wget' that program was. And
12 producing 14 different classified hard drives to the defense and
13 going through that entire process seems needless for something that
14 is completely irrelevant.

15 MJ: What's the government's position--well, you were saying
16 you can't give me a position on the damage assessments.

17 Is that correct?

18 TC[MAJ FEIN]: No, ma'am. The damage assessments, I think we
19 can give you a general without going into any specificity, ma'am.
20 But as we have provided, again, in the case management order
21 supplement to both you and the defense, the government has provided
22 as an enclosure the criteria we have used in order to search and
23 preserve material that can be potentially *Brady*, *Giglio*, all the
24 other material. Again, outside military authorities and

1 classified. We have been endeavoring to search that material, but
2 in the end using the *Brady* standard we are only required to turn
3 over if it is *Brady*. Not if it is helpful to the defense. That's
4 a R.C.M. 701(a)(6) interpretation, but if it is *Brady* material, we
5 have to turn it over or invoke the privilege and follow the
6 procedures in M.R.E. 505. We've been doing that process. We
7 simply, until today on this issue have not been able to get in
8 front of the Court in order to adjudicate the next step, under
9 M.R.E. 505 to go forward. And once with the case management order
10 to know when we are going to litigate classified evidence in--
11 during this court-martial, then we will be ready to present the
12 information that was or was not found with the right approvals or
13 not. This is an on-going issue, as well, ma'am.

14 Damage assessment themselves are living documents that
15 capture damage as the date of the document. It doesn't mean that
16 damage can't happen the next day; which is why it is a very long
17 process.

18 MJ: Um-hmm.

19 TC[MAJ FEIN]: The defense has asked for 4 damage assessments;
20 specifically asked for 4 damage assessments. First, we maintain
21 that the Department of State has not completed the damage
22 assessments.

23 MJ: All right. If they're not completed----

24 TC[MAJ FEIN]: Yes, Your Honor.

1 MJ: Is--Mr. Coombs, let me just ask you to clarify here.

2 CDC[MR. COOMBS]: Yes, Your Honor.

3 MJ: Are you asking for what has been completed?

4 CDC[MR. COOMBS]: Yes, Your Honor. What we're asking for

5 are those--any damage assessment that has been done up to this

6 point that would enable us to see what the Department of State

7 believes. They have said themselves they assigned over 120 people

8 to go through each of the cables to identify any potential issue

9 they needed to address immediately. That might be a good starting

10 point for what we would need provided to us.

11 MJ: Okay.

12 Proceed, Captain Fein.

13 MJ: So you are not arguing that there is nothing there, you

14 are arguing that it is not complete?

15 TC[MAJ FEIN]: Ma'am, I am authorized to say that the

16 Department of State has not completed the damage assessments.

17 Although the Department of State has monitored and continues to

18 monitor the impact of the release of the cables discussed under

19 Secretary Kennedy's declaration the defense has. In this matter,

20 the Department has not finalized an assessment of the damage, the

21 leaks of these cables has caused to date or over a shorter interim

22 period of time. Ma'am, as far as the Central Intelligence Agency,

23 the Wikileaks Task Force has completed an assessment. Again,

24 classified, outside military authority. And finally, Your Honor,

1 the Office of National Counterintelligence Executive, they have not
2 completed the damage assessments.

3 MJ: Okay, so the IRTF has?

4 TC[MAJ FEIN]: Yes, ma'am. The--within military authority,
5 the DIA, so it's the same--it's--IRTF is a subordinate organization
6 or was of the Defense Intelligence Agency; has completed the damage
7 assessments; and it is classified.

8 MJ: Okay, and you said the one above it is not complete?

9 TC[MAJ FEIN]: I'm sorry, ma'am. Which document----

10 MJ: The Wikileaks?
11

12 TC[MAJ FEIN]: The Wikileaks Task Force, ma'am, is the Central
13 Intelligence Agency's Task Force, has completed a damage
14 assessment.

15 MJ: Okay, and what about the Department of Justice?

16 TC[MAJ FEIN]: Ma'am, the Department of Justice is a--main
17 Justice does not complete damage assessments.

18 MJ: So that doesn't exist?

19 TC[MAJ FEIN]: That does not exist, ma'am.

20 MJ: All right. Mr. Coombs, do you dispute that?

21 CDC[MR. COOMBS]: Your Honor, the Department of Justice was
22 just part of the collection of information they've had a very
23 public effort in order to obtain information for their intended
24 prosecution. So if the Department of State hasn't done anything in

1 combination, I don't know if that is true or not. But if the
2 Department of State represents that we haven't done anything in
3 review of information, then there might not be a damage assessment
4 by them. But they are part of the larger investigation and case
5 preparation that has been on-going really since the late 2009--
6 actually 2010 timeframe.

7 MJ: All right. Government, anything else?

8 TC[MAJ FEIN]: The final that I don't think we've addressed
9 but it is the Federal Bureau of Investigation's investigation. The
10 defense has requested the discovery of it and as we've stated in
11 our motion, we do intend to after a protective order, a judicial
12 protective order is in place, to produce what we call the first
13 wave that we have approval because it is classified. We will--we
14 actually have the CD in the safe ready to go to hand it to the
15 defense.

16 MJ: Which you will do after we come up with the protective
17 order.

18 Is that correct?

19 TC[MAJ FEIN]: Yes, ma'am. The second you order it, ma'am,
20 the CD is going to the defense.

21 [Trial counsel team conferred.]

22 TC[MAJ FEIN]: Your Honor, may I have a moment?

23 MJ: Yes.

24 [Trial counsel team conferred.]

1 TC[MAJ FEIN]: No, Your Honor.

2 MJ: Now with respect to the damage assessments, does--are
3 they, at least, identified?

4 TC[MAJ FEIN]: Ma'am, for the ones that exist, they are
5 identified.

6 MJ: All right.

7 TC[MAJ FEIN]: I might not have understood your question,
8 ma'am. I am sorry.

9 MJ: That is--are they, have been gathered, I guess, is a
10 better way to put it; the information?

11 TC[MAJ FEIN]: Yes, ma'am. For the completed assessments,
12 they are in a central location within the owning agency or
13 department that has them.

14 MJ: All right. Well, in the event that I make your relevance
15 and necessary determination, I looked at the proposal for 6 weeks.

16 One of them is to identify stake holders?

17 TC[MAJ FEIN]: Yes, ma'am.

18 MJ: So that hasn't been done?

19 TC[MAJ FEIN]: No, ma'am., it has not because the United
20 States has maintained that, again, it's not relevant or necessary;
21 at least to the merits. Only if there is *Brady* material. Only the
22 *Brady* material is--is--is--we're required. It's our obligat--it's
23 our requirement, our obligation to turn over the *Brady* material.
24 So for argument's sake, if government entity 'x' creates a damage

1 assessment; and that damage assessment is 100 pages long and 5
2 lines in it would tend to reduce the punishment, then those 5
3 lines, as long as there is proper context, are discoverable. The
4 remaining portion; and again, in this hypothetical, would be
5 aggravating would not be discoverable. Now of course if there
6 are other rules that would apply, if they could be used to impeach,
7 that is *Brady* material. There could be a potential *Jencks* issue if
8 the drafter of the document is testifying. But again, that will
9 come up in due time. But and the opposite example.

10 If the 100 pages and 90 of them are helpful to the
11 defense because it reduces--it shows it can be used to reduce
12 punishment, then those 90 pages are discoverable and the 10 pages
13 are not.

14 MJ: What authority do you have for me that M.R.E. 505 applies
15 before a privilege is invoked?

16 TC[MAJ FEIN]: Yes, ma'am. Your Honor, as stated before
17 M.R.E. 505 outlines both the privilege to protect information the
18 procedures allow for limited or even full disclosure as required
19 under the Rule. Ah, a privilege defines classified information or
20 M.R.E. 505(b)(1).

21 MJ: So your position is M.R.E. 505 applies even though there
22 is no privilege info?

23 TC[MAJ FEIN]: Absolutely, ma'am.

1 MJ: It involves--and the Rule, I think, contemplates that.
2 Absolutely.

3 What part of the Rule does?

4 TC[MAJ FEIN]: Well, ma'am, starting with first the only--if I
5 may, Your Honor, the only time a privilege--the only time M.R.E.
6 505 actually talks about the procedure for privilege is either
7 under M.R.E. 505(c) about who the authority is; or M.R.E. 505(i)(3)
8 about if we are asking for or the United States moves for an 'in-
9 camera' proceeding about the privilege being invoked.

10 But the procedures under--starting with M.R.E. 505(d),
11 M.R.E. 505(e); those two, first off don't require a privilege to be
12 invoked. It's a procedural rule. How to handle classified
13 information pre and post referral. Ah, additionally, to highlight
14 the last sentence in M.R.E. 505(e) for you, Your Honor, the
15 ultimate authority would come into as it states, "The Military
16 Judge may consider any other matters that relate to classified
17 information or that may promote a fair and expeditious trial." We
18 are ultimately arguing is that by you doing an initial relevancy
19 determination, that is exactly what is happening. It is a both
20 fair and expeditious trial. The rule is there to define those
21 procedures and the privileged to handle classified information.
22 It's the--also contemplated if you jump down, Your Honor, to M.R.E.
23 505(g). A protective order--(g)(1), excuse me, Your Honor. "If
24 the government agrees to disclose classified information to the

1 accused, the Military Judge, at the request of the government shall
2 enter a protective order." So if we agree to turn over classified
3 information, there is no privilege being invoked but the Rule still
4 contemplates classified information and how to proceed with it.

5 MJ: The other question I have for you, government, is the
6 standard in M.R.E. 505(f) talks about, "A relevant and necessary
7 determination if the claim of privilege hasn't been made under this
8 Rule with respect to classified information that apparently
9 contains evidence that is relevant and necessary to an element of
10 the offense or a legally cognizable defense, the matter shall be
11 reported to the Convening Authority." Now that says privilege and
12 says nothing about sentencing where paragraph M.R.E. 505(i)(4)(b)
13 does.

14 TC[MAJ FEIN]: Yes, Your Honor.

15 MJ: What is the distinction and why is it there?

16 TC[MAJ FEIN]: Yes, ma'am. Actually after referral of trial.
17 May I have a moment, ma'am?

18 MJ: Yes.

19 [Trial counsel team conferred.]

20 TC[MAJ FEIN]: Ma'am, the standard is higher. We--the United
21 States argues the standard is higher under M.R.E. 505(i)(4)(b)
22 because this is talking about use at trial.

1 TC[MAJ FEIN]: And the, I think the M.R.E. contemplates that
2 it creates a higher standard for presentencing evidence by making
3 it more restrictive because----

4 MJ: But how do we even get there if the relevance and
5 necessity determination I make earlier deals only with the merits?

6 TC[MAJ FEIN]: Because what we're arguing, ma'am, and what
7 we're proposing is actually a more liberal interpretation for
8 discovery. This is about discovery. As you're making a
9 preliminary relevancy--relevance and necessity determination for
10 discovery. If the defense wants--requests to use or gives
11 notification of M.R.E. 505(h) that they intend to use the
12 information, then this standard follows because it is actually
13 being used at trial. We are only talking about, again, the access
14 to the defense to get the information. Your initial determination.
15 Just like under R.C.M. 703. Defense wants it. Government says no.
16 They do a motion to compel. Relevant and necessary is the
17 standard. If you, as the Court, deem it relevant and necessary and
18 make the finding, we are then compelled to produce it.

19 MJ: Okay. Anything else?

20 TC[MAJ FEIN]: No, Your Honor.

21 MJ: All right. Anything further?

22 CDC[MR. COOMBS]: Yes, Your Honor. Your Honor, the
23 government's response, again, clearly indicates that they do not
24 understand appropriate discovery within the military. They state

1 that if it is classified information, then it has to be relevant
2 and necessary in order to provide it and we have to go through the
3 M.R.E. 505 procedures. That's clearly not the case. They provided
4 plenty of classified information prior to trial to the defense.

5 The issue is if it is *Brady* material, they seem to think
6 classified information trumps all *Brady*, they don't provide any of
7 that stuff; and they give the example of if the damage assessment
8 has 90 pages of hurtful stuff but only 5 lines with a few other
9 lines in context of helpful, we're only going to give the 5 lines.
10 That may be for the *Brady* aspect, reducing punishment, reducing
11 guilt, that may be correct. But for the specifically requested
12 standard under R.C.M. 701(a)(2) that is not. Because that other 90
13 pages or so of hurtful stuff would be information that the defense
14 would need in order to prepare its case to understand----

15 MJ: What is your position with respect to the government
16 position that R.C.M. 701(a) basically flips you from R.C.M. 701 to
17 M.R.E. 505?

18 CDC[MR. COOMBS]: It doesn't. All that says is that; and
19 again, this is a fundamental precept in our system, discovery is
20 governed by R.C.M. 701. And they've even consistently here today
21 cited relevant and necessary along with their motion which cites
22 that same R.C.M. 703 standard and the same wrong *Brady* standard.
23 R.C.M. 701 still controls. *Brady* under R.C.M. 701(a)(6) controls.
24 R.C.M. 701(a)(2), specifically requested items controls.

1 Now whether or not you can, and this is classified, but
2 you can do this with any other type of privileged information;
3 whether or not there is a reason not to hand it over then could
4 take you over--the R.C.M. 701 land will not force you to provide
5 it, but then you have to go over to the correct procedures under
6 M.R.E. 505; which they would have to then say the reason we are not
7 handing this *Brady* material over, and let's use the damage
8 assessments, is because the OCA is going to invoke the privilege.
9 Well, that would be the reason they didn't hand the *Brady* over in a
10 timely manner and then they would have told the Court that hey, we
11 understand our requirements under R.C.M. 701(a)(6); which they
12 didn't understand. Even when they made their argument they didn't
13 understand the correct standard. But we are now going to tell Your
14 Honor that we are invoking the privilege based upon M.R.E. 505(f);
15 or we understand our *Brady* requirements and we're going to abide by
16 those and we are going to ask for alternatives to disclosure. And
17 of that in their reply motion would have indicated that the
18 government understood their obligations. Their reply motion, when
19 you read that, that is from somebody who does not know how military
20 law works. Then when you take a look at their argument here today,
21 they try to piecemeal it a little bit but the one clear factor that
22 we can't avoid is if you today said, you know what, I think these
23 damage assessments--you know, that it would be helpful to the
24 defense. Hand them over. Or I believe that it is *Brady* material.

1 Hand them over. They haven't even thought through the hoops yet in
2 order to get it to the defense. And now there are conservatively
3 estimating 45 to 60 days to do that. They've answered to your
4 question, "Have you even identified the equity holders? "No, we
5 haven't." Well go to the OCA, the original classification
6 determinations that are what's done by the OCA. They started this
7 process really in the 2010 timeframe. We got the last OCA's
8 determination right before the Article 32 in November of 2011.
9 Over a year for this 45 to 60 day process they believe they could
10 accomplish. And then the other aspect that they didn't even
11 address is why did you cite the appellate level for *Brady*? Then
12 when the Court asked, "Give me the *Brady* standard as you understand
13 it?" They struggled with even giving that *Brady* standard. It is
14 clear here that the government has so hopelessly messed up
15 discovery in this case that it has prejudiced my client. And I
16 didn't know for sure until I saw their response motion. Of course,
17 I got that response motion last Friday; I worked the entire
18 weekend, and Monday [and] Tuesday to get my reply saying, hey we've
19 got a serious problem. The government does not know what it is
20 doing. And then I almost had to say to myself I have to be missing
21 something. I have to be the one who is missing the boat. 'Cause
22 no one can miss the mark this much. Yet now, with Captain Fein's
23 argument, he has clearly missed the mark. Not by a little bit.

24 MJ: All right.

1 CDC[MR. COOMBS]: By a lot. And based upon that, the
2 defense is filing a motion to dismiss all charges with prejudice.
3 So I'd like to have this motion marked as the next appellate
4 exhibit.

5 [The court reporter marked AE XXXI and handed it to the Military
6 Judge.]

7 CDC[MR. COOMBS]: I understand that the government,
8 undoubtedly want to reply. And we would like to argue this.

9 MJ: I think so. The Court would actually like a chance to
10 read the motion before we go.

11 CDC[MR. COOMBS]: Yes, Your Honor. But we'd ask that when
12 you do that, Your Honor, that you'd take a look at our request to
13 compel discovery; that you take a look at the government's reply to
14 that. The standards they cite, what they said they did, and what
15 they are relying upon not to give the information. Then you take a
16 look at the authority we cite in this motion to dismiss with
17 prejudice, all charges. You will see time and time again when
18 cases have seen that the government has wholesalely missed the mark
19 on *Brady*, which they do here because they believe M.R.E. 505 trumps
20 *Brady*.

21 MJ: I don't believe that is what they told me.

22 CDC[MR. COOMBS]: Well, what they said is if it is *Brady*
23 land, R.C.M. 701 doesn't control. So R.C.M. 701--they go back to
24 the federal *Brady* standard. Apparently, yes we can. The

1 Constitution, we've got to do the Constitution, and that is due
2 process, 5th Amendment.

3 *Brady*, the federal standard, which they cite, is
4 literally the smoking gun standard. They cite that as the standard
5 when it is really the appellate standard. So take a look at their
6 motion. They specifically state that we don't have to give this
7 stuff over unless it would seriously undermine confidence in the
8 verdict. That is the appellate standard. You have to take them at
9 their word when they cite that and they say that for 12 pages.

10 When Captain Fein writes his signature underneath that is saying as
11 an officer of the Court this is what I am representing. My
12 understanding of my *Brady* obligations. Then when you see our reply
13 to this indicating that we have a serious problem, here today, now
14 the government gets up and says no-no, we clearly understand R.C.M.
15 701. We've always been complying with that. And we understand
16 R.C.M. 701(a)(6), then how in the world do you ever cite *Brady* as
17 something that is only required if it would substantially undercut
18 our confidence in the verdict? How do you cite that if that is
19 your firm understanding? It is clear the government has been
20 operating for the last 2 years on wrong *Brady* standard. This is
21 really like baking a cake. You've got a cake that has 45 minutes
22 that needs to be in the oven and we are at minute 40. The
23 government has just figured out that it forgot to put eggs in the
24 cake. So you have to take that cake out and you can't just crack

1 some eggs over it and say hey, let's put it back in the oven.

2 You've got to throw the cake out and start anew.

3 CDC[MR. COOMBS]: So we would need, at the very least, a
4 special magistrate to go back and say, hey, we are going to take a
5 look at what the government has looked at for *Brady* from this point
6 starting the case forwarding.

7 MJ: And where is my authority under the UCMJ to appoint a
8 special magistrate?

9 CDC[MR. COOMBS]: It is within our cited rules, Your Honor,
10 the appellate court actually has indicated various remedies that
11 the Court could do in order to enforce the *Brady* standards; but the
12 other problem and probably more fundamentally in this instance that
13 we think the problem is, is this is beyond curing. We've had 2
14 years of where the government has operated under the wrong standard
15 for *Brady*; under the wrong standard for discovery----

16 MJ: All right. Mr. Coombs, I am not addressing the merits of
17 this motion now. You just filed it a minute ago.

18 CDC[MR. COOMBS]: I understand, Your Honor. I had to wait
19 in order to see what----

20 MJ: So it is now Appellate Exhibit XXXI.

21 CDC[MR. COOMBS]: ----what, if any, response the government
22 could possibly provide for their failures.

23 MJ: Yes Captain Fein?

1 TC[MAJ FEIN]: Your Honor, the United States would like to
2 just, again, point out that the defense is relying on open file
3 discovery rules.

4 In this case, any information that we have not produced,
5 that we--we have not produced waiting for a Military Judge is for
6 classified information. The United States has attempted for the
7 last almost 2 years to go beyond, with the most liberal
8 interpretation of the discovery rules when it comes to classified
9 information and produce as much as possible. The rules still allow
10 us to do that under M.R.E. 505(g)(1) with a special court-martial
11 Convening Authority protective order we can disclose information.
12 The only information that hasn't been disclosed is sensitive
13 information that requires the trier--or excuse me. Not trier, the
14 fact finder; but the ultimate arbiter to make those decisions.
15 That's the only information we are talking about. We are not
16 talking about the information that goes to the merits of the case
17 so the defense can't prepare for their case. And because it is
18 classified, again, we are reviewing the material, the classified
19 material under the *Brady* standard and will produce, or at least
20 invoke the privilege or follow the procedures as outline and as
21 we've proposed in all of the other filings in order to get the
22 information that needs to get to the defense and we're required--
23 they need for a fair trial.

24 MJ: All right.

1 The Court will take this under advisement. I note it is
2 1:40 at this point, or 1340 in military terms.

3 Are the parties ready to take a recess for lunch?

4 CDC[MR. COOMBS]: Yes, Your Honor.

5 TC[MAJ FEIN]: Yes, Your Honor.

6 MJ: All right. And is an hour sufficient?

7 CDC[MR. COOMBS]: Your Honor, I would ask, actually, maybe
8 come back at 1500, 3 o'clock?

9 MJ: That is fine.

10 Any objection?

11 TC[MAJ FEIN]: No, Your Honor.

12 MJ: All right. Then at 1500, we will take up the motion to
13 compel depositions and then at that point we will recess the court
14 for the day.

15 Anything else we need to address before we recess?

16 TC[MAJ FEIN]: No, ma'am.

17 CDC[MR. COOMBS]: No, Your Honor.

18 MJ: Court is in recess.

19 **[The Article 39(a) session recessed at 1343, 15 March 2012.]**

20 **[The Article 39(a) session was called to order at 1510, 15 March**
21 **2012.]**

22 MJ: This Article 39(a) session is called to order.

23 Let the record reflect all parties present when the court
24 last recessed are again present in court.

1 Are the parties prepared to address the defense motion to
2 compel depositions?

3 CDC[MR. COOMBS]: Yes, Your Honor.

4 ATC2: Yes, ma'am.

5 MJ: All right.

6 CDC[MR. COOMBS]: Your Honor, with regards to that motion,
7 we had an issue this morning with the attachments. You have in
8 front of you the attachments from the defense with the exception of
9 Attachment 'C'. Attachment 'C' will be placed as part of the
10 SECRET or classified portion of the record of trial. The
11 government will be providing you with Attachment 'C'.

12 MJ: All right. Thank you.

13 And that would be the defense motion to compel
14 depositions is Appellate Exhibit VII; we have the prosecution
15 response as Appellate Exhibit XV and I assume these are the
16 enclosures?

17 ATC2: Yes, ma'am.

18 MJ: And we have the defense reply which is Appellate Exhibit
19 XXV also with attachments.

20 Now are we talking about the attachments to the reply;
21 Attachment 'C' to the reply or Attachment 'C' to the original
22 motion to compel?

23 CDC[MR. COOMBS]: To Appellate Exhibit XXV, Your Honor.

24 MJ: Okay. The reply.

1 All right. Does either side desire to present any
2 evidence?

3 CDC[MR. COOMBS]: No, Your Honor.

4 ATC2: One moment please, Your Honor.

5 [Trial counsel team conferred.]

6 ATC2: No, ma'am. Just what we've proffered in our
7 enclosures.

8 MJ: All right.

9 Mr. Coombs, would you like to argue?

10 CDC[MR. COOMBS]: Yes, Your Honor. Your Honor, the defense
11 requests the Court order depositions of each of the OCAs for three
12 reasons.

13 First, the OCAs were essential witnesses;

14 Second, the OCA witnesses were improperly denied at the
15 Article 32 hearing; and

16 Third, the government has improperly impeded the
17 defense's access to these witnesses.

18 With regards to the first argument. The witnesses were
19 essential witnesses at the Article 32 hearing. They should have
20 been produced at the Article 32 hearing 'cause for over a year this
21 trial, this court-martial proceeding was delayed as we waited on
22 getting the OCA classification determinations. As I stated
23 earlier, the last classification determination happened in eleven--
24 basically, the middle of November of 2011. As soon as we had that,

1 that is when the Article 32 proceedings began and it was held up
2 based upon having to obtain these OCA determinations. The OCAs
3 were vital witnesses. They were very important witnesses. The
4 government doesn't seem----

5 MJ: How so?

6 CDC[MR. COOMBS]: And I will get to that right now, ma'am.
7 The government doesn't seem to recognize that they were vital or
8 important, but they are and if you look at our reply motion, we
9 cite both the *Diaz* decision and the *Morison* decision. And both of
10 them talk about the fact that an OCA's classification determination
11 is controlling on how the matter is held, what procedures that you
12 invoke to hold on to the material, but is not controlling with
13 regards to the element under 793(e) on whether or not PFC Manning,
14 or in this case, PFC Manning either knew or should have known that
15 the information could cause damage to the United States. So when
16 you take a look at the OCA determinations, these were individuals
17 who are providing the basis, undoubtedly, for the government to
18 invoke privilege; if, in fact, they do that; but also they are
19 giving an opinion on whether or not this information could cause
20 damage. They were key for the government's preparation. Under
21 Article 46 of the Uniform Code of Military Justice, we, the
22 defense, should have equal access to those witnesses. Likewise,
23 they would be key for us. As I explained earlier, if the OCA
24 determinations are that this could cause damage and we ultimately

1 get the damage assessments that are inconsistent with that, then
2 that would be good impeachment information for these OCAs.

3 Or if the OCAs can articulate why they came to the
4 determination that the information was, in fact, something that
5 could cause damage, that would also be something that the defense
6 would like to cross-examine them on and should have been able to at
7 the Article 32; as opposed to waiting until trial. When you take a
8 look at the OCAs and their classification determinations, these
9 were things that the government fought hard to get in front of the
10 Article 32 Officer because they believe they were important,
11 apparently, for the presentation of their case. They can't fight
12 hard for the OCA determinations on one hand and say these witnesses
13 are irrelevant or not necessary on the other. They were key
14 witnesses. Witnesses that we should have been able to have equal
15 access to. The government certainly had access to them. Second,
16 the OCA witnesses were improperly denied at the Article 32 hearing.
17 We requested their presence at the Article 32 hearing. We asked
18 for the Article 32 Officer to bring these OCA witnesses to the
19 Article 32 and the Article 32 Officer indicated that they were, in
20 fact, relevant but ultimately were unavailable. The determination
21 for unavailable was based upon the fact that he believed the
22 expense, the cost, the delay, the effect on military operations was
23 too great in comparison to their testimony. The value of their
24 testimony. We see in the government's reply that two of these OCAs

1 were actually located here at Fort Meade, Maryland; the location of
2 the Article 32 hearing. Which I----

3 MJ: Didn't they do classification reviews on conduct that was
4 not charged?

5 CDC[MR. COOMBS]: They did classification reviews on
6 material that undoubtedly the government--well, potentially, the
7 government will be using in their sentencing case. Therefore, that
8 is definitely in the area of information that we should be
9 preparing, as well. As you know, we don't have a break between the
10 merits and sentencing case. So when they make classification
11 determinations on matters that are, in fact, going to undoubtedly
12 be in the government's aggravation case, we should have equal
13 access to them not at, you know, at some point during the trial.
14 They should have been presented at the [Article] 32. We asked for
15 them at the [Article] 32 and they did give the classification
16 determination based upon evidence in this case. They were relevant
17 witnesses and important witnesses. But that underscores though
18 that the problem that these witnesses we never even really inquired
19 into if they could attend. They just--the IO took for granted the
20 government's position that these witnesses were unavailable. The
21 defense requested that the IO and the government contact the
22 witnesses to determine whether or not they could attend or would
23 attend. That was never done. Instead, again, it was just we
24 cannot bring these witnesses because they are too important.

1 The government now says that the defense's request was
2 premature in that the witnesses could be available for trial and
3 therefore, there is no reason to do the deposition. The defense
4 would ask the Court to take a look at *United States v. Chestnut*, 2
5 M.J.84. Language from that opinion, I think, is particularly
6 illuminating. Trial counsel refused to--excuse me. The trial
7 judge refused to allow--and this is a trial judge, not a military
8 judge, the defense to examine the witnesses under oath at the
9 Article 32 hearing because of her unavailability, yet also refused
10 to allow the defense a continuance to take her deposition before
11 trial because of her then availability. Such an approach can
12 hardly be said to comport with a meaningful concept of full
13 discovery as established in our military justice system. That
14 thread unfortunately has gone on throughout this case of the idea
15 that this is--these are witnesses that you can interview later.
16 These are witnesses that you can interview at trial, these are
17 witnesses that you can request at trial. Article 46 clearly
18 indicates that if the government has had access to these witnesses,
19 so should the defense. That is what we ask and that leads me to
20 the third category, the government has improperly impeded the
21 defense's access to these witnesses. The defense has taken
22 proactive steps in order to try to interview these witnesses. We
23 first asked for their presence at the Article 32 hearing; that was
24 denied.

1 We objected to the Investigating Officer considering
2 their unsworn declarations and the Investigating Officer concluded
3 that the unsworn declarations were, or they at least had indicia of
4 reliability of sworn declarations and so he considered those.
5 Immediately after the [Article] 32, we made a request to the
6 Special Court-Martial Convening Authority to order a deposition;
7 that request was denied. Then the defense made a request for oral
8 depositions to the General Court-Martial Convening Authority; that
9 request also was denied. So here we are now at the pretrial stages
10 and we are coming to the Court and asking the Court to enforce a
11 substantial--a substantial pretrial right of PFC Manning; and that
12 is to have equal access to witnesses. In this case there can be no
13 doubt that the OCA witnesses are vital witnesses. If they're
14 necessarily vital to the government's case, they could very well be
15 vital to the defense's case and we should be given access to them.
16 We went to the government and we said afterwards, after receiving
17 the second denial, we asked in the discovery request to please give
18 us the contact information for the civilian OCAs, but we've never
19 been provided. The government's response to that was, "No."
20 Hearing that response, I sent another email inquiry to the
21 government saying, "Can you please explain your response in light
22 of Article 46?" The government, again, just simply said, "No." At
23 that point the defense went to the government and said, "Look, we
24 may be interested in calling these witnesses.

1 Please provide us the contact information." They said,
2 "Absolutely. We'll get on that." A month went by, nothing.
3 Finally the defense, again, went to the government and said,
4 "Please remember when we asked for this a month ago. Can you give
5 us contact information for these OCA witnesses?" They gave us
6 contact information for one of them, but that wasn't contact
7 information for that witness, per say. It was a point of contact
8 that you would have to work through. At the same time that they
9 gave that you will see in the Enclosure 'C'--Attachment 'C' to our
10 motion, they said, "You might be having to deal with *Touhy*
11 requirements. All they said was *Touhy* requirements. And so the
12 defense, of course, looked into what *Touhy* requirements are, and
13 yet, another hurdle apparently that the government reads into our
14 access to these witnesses. We have to go through the *Touhy*
15 regulations for the civilian witnesses to lay out exactly what we
16 want to talk to them about, what the relevance is, why we want to
17 talk to them, and submit that to our party opponent for them to run
18 it up the flag pole to determine whether or not that request will
19 be granted. That is not equal access under Article 46. Once we
20 got the added burden or the hurdle that the government put in front
21 of us, looking into that, *Touhy* doesn't apply and should not be
22 read to apply; and, in fact, federal courts, at least one federal
23 court has read it not to apply in cases in which the United States
24 is a party.

1 MJ: And what court, what case is that?

2 CDC[MR. COOMBS]: I believe that is in my motion. It's a
3 federal district case. The district court judge, and I cited this
4 back, it is in also with my email back to the government where I
5 said----

6 MJ: Well, I don't have emails before me.

7 CDC[MR. COOMBS]: It would, ma'am in the classified version.

8 MJ: I don't see----

9 CDC[MR. COOMBS]: It's the Attachment 'C'. So that
10 Attachment 'C' lays out the entire discourse of the *Touhy* issues.
11 And so I cited back that federal case and said, you know please
12 take a look at that and tell me how you believe that it applies in
13 this case. Ultimately, the government came back to say, "All
14 right. We believe"--and I believe I have this accurate. Their
15 position is, "*Touhy* would not apply if the Court ordered a
16 deposition, but *Touhy* would apply if it is just the defense trying
17 to contact and reach out to the civilian OCAs." In which case, the
18 government has indicated that they would assist us in going through
19 the *Touhy* requirements. I asked the government to provide me then
20 with whatever requirement each of these OCAs would have if we are
21 forced to go through *Touhy* and I have not yet received them.

22 MJ: When did you ask?

23 CDC[MR. COOMBS]: I asked back, now about 2 weeks ago,
24 ma'am; but the email traffic will give you the exact date.

1 The government's position on this issue seems to be much
2 like in *Chestnut*, where these witnesses were unavailable for you
3 pretrial, but these witnesses will be available to you at trial,
4 therefore there is no need for you to do a deposition. With
5 regards to the civilian OCAs, I think it is clear we need a
6 deposition in order to have access to them. With regards to the
7 military OCAs, each one of them with the exception of Captain
8 James, all with the exception of one, a Captain, is a General
9 Officer or a very senior civilian. These are not the--necessarily
10 the type of people you just pick up the phone and call. So I asked
11 the government to provide me with points of contact for each of
12 them; and the government said they would work on that. I haven't
13 received that yet but obviously, these are people that you are
14 going to have to coordinate with. In my motion I say the practical
15 reality of that is that these are interviews that are going to have
16 to take place, based upon the subject matter, in a specific area.
17 Each of these OCAs is at different locations, so more than likely
18 the defense would be forced to travel to each location of the OCA
19 to do a pretrial interview of them.

20 MJ: You can't use a telephone?

21 CDC[MR. COOMBS]: We cannot use a telephone, ma'am.

22 MJ: A secure telephone?

23 CDC[MR. COOMBS]: Well, the defense would then say the
24 problem is having access to the documents to have them in front of

1 them to ask them questions. So, I'll use the example of the
2 Department of State OCA. I would like to go through each of the
3 116 charged documents and talk about each one of those as to why he
4 made his particular conclusion, has he seen anything, he at that
5 time said it could cause damage. Now we've had almost 2 years, has
6 that belief come true? But in order to do that I would have to be
7 able to hand the document to him and that cannot happen over a
8 secure telephone. The best place to have this happen would have
9 been at the Article 32. Absent that, a deposition is the best
10 place for this to happen and what the defense is asked is that a
11 deposition be ordered for all of the OCAs. We coordinate a time in
12 which it can be accomplished within a set window and at a
13 particular location; probably somewhere in this general vicinity
14 which would be the easiest place I'd imagine for everyone to come
15 to. Then we would have equal access to the witnesses that Article
16 46 envisions and we would be able to interview clearly important
17 witnesses that are related to the charges in this case.

18 MJ: Okay.

19 CDC[MR. COOMBS]: Subject to your questions, ma'am.

20 MJ: Government.

21
22 ATC2: Ma'am, as you know the starting point for depositions is
23 an exceptional circumstance of the case where the testimony of the
24 witness needs to be preserved for later use at trial or at an

1 Article 32. And as the defense correctly cited there are--a
2 deposition request can be denied for good cause. A good cause for
3 denial is if that witness will be available at trial absent the
4 unusual circumstances that defense described; which would be the
5 improper determinations by the Article 32 Officer or that the
6 government has impeded defense access to those witnesses. As
7 you'll see from the Article 32 Officer's determinations in which
8 the government spelled out in their brief in their response to
9 defense's motion, the Investigating Officer made--used the
10 balancing test as laid out in *U.S. v. Ledbetter* and determined that
11 the significance of the testimony of the OCA witnesses did not
12 outweigh the impact--the difficulty or the cost or the impact on
13 military resources to get those witnesses.

14 MJ: Captain Overgaard, let me stop you for just a moment.

15 ATC2: Yes, ma'am.

16 MJ: If the defense requests the witnesses and I find them
17 relevant and necessary for trial, is there any impediment that the
18 government is aware of to these witnesses coming?

19 ATC2: There is no impediment that the government is aware of
20 for these witnesses coming, Your Honor. The government will work
21 as we always do to obtain all relevant witnesses for the case as we
22 do in every case, Your Honor.

23 MJ: Okay.

1 ATC2: Just to address some of the defense's specific
2 arguments, again, as covered in the government's brief, these
3 witnesses were not vital to the determination of the Article 32.
4 The standard at the Article 32 was that reasonable grounds exist to
5 move forward with the charges and the IO was given the authority
6 under [R.C.M.] 405(g) to determine relevance and availability and
7 they used the proper standard in *Ledbetter*, the balancing test, and
8 he spelled out specifically as *U.S. v Samuels* tells the
9 Investigating Officer to--his reasons for determining the
10 unavailability of those witnesses. Again, as the government cites
11 in its response, the testimony that these witnesses would have
12 established was brought out simply on the face of the documents.
13 These are original--well, some of them are original classification
14 authority witnesses and others would--were going to testify about
15 the classification of particular documents. All the documents that
16 were charged as classified were marked on their face as classified.
17 And, um----

18 MJ: So with these witnesses, these declarations, were they
19 addressing classification now or classification at the time of the
20 offense?

21
22 ATC2: What the classification review does, Your Honor, is it
23 reviews the classification of a document on the four corners of
24 that document at the time of the classification review. It is a

1 procedural mechanism that is spelled out by Executive Order 13526,
2 which gives these specific individuals the delegated authority from
3 the President to do these classification reviews because they are
4 the foremost experts on the information that they are reviewing.
5 So there is simply--they have nothing to do with impact or damage
6 that is potentially caused in the future by the information. They
7 are reviews as to whether or not that document is classified based
8 on specific, um--specific reasons for classifications spelled out
9 in the Executive Order 13526. They are done by those individuals
10 based on that specific moment of time in which they are reviewing
11 those documents. So it is a procedural mechanism in order to
12 verify that the documents are, in fact, classified properly and the
13 reasons that they are classified and under 793(e) they would also
14 go to show that it is national defense information.

15 MJ: What is the government's position to *United States v.*
16 *Diaz*?

17 ATC2: The defense cited *U.S. v Diaz* to talk about *mens rea*.
18 *Diaz* specifically talks about 793(e) stating that the um, 793(e)
19 requires a willful--a willful um--I'm trying to say--that they
20 willfully transmit or cause to be communicated, the information.
21 It talks about whether or not the bad faith requirement is required
22 in 793(e) which it is not. Then it separately talks about how to
23 establish *mens rea* for whether or not the accused could know that
24 the information could be classified; which has nothing to do with

1 the OCA determination. At the Article 32 and in the trial, well,
2 at the Article 32 the government had several witnesses which talked
3 about the accused's training, the accused's knowledge as an intel
4 analyst, the accused's signing of AUPs, of authorizations to use
5 the systems, the showing of the DCGS-A banner that was on his
6 computer every time he used it, and various ways to show that he
7 could have known that the information was classified and he knew
8 what that classification meant. The determination by the OCA is
9 separate and apart from whatever *mens rea* requirement that the
10 government will show and did show at the Article 32. The defense
11 also cites the *Chestnut* case to talk about improper denial of a
12 witness. But just to highlight that case for the Court. In that
13 case, the prosecutrix, it was a victim--an alleged victim in a rape
14 case, was deemed unavailable by the Article 32 officer; and it was
15 a rape case so she was a key witness in the case and she had given
16 a signed statement--a signed sworn statement that said that she
17 would appear for trial and then the Investigating Officer did not
18 even attempt to ask her to get to--to be at that trial. So that
19 case is very different from this case in that: One, she was an
20 essential witness whose credibility would be under, you know,
21 scrutiny for that particular--for that charge and for who she was
22 in the case; and
23 Two, it's different because she had made a statement that
24 she would be available, a sworn statement.

1 And the difference for this case because these witnesses
2 were not essential at the Article 32. As I said, the documents
3 were classified on their face. Other evidence was discussed and it
4 was, in fact, national defense information. In addition, we had
5 the sworn declarations that the IO eventually did consider after he
6 made the reasonably unavailable determination.

7 MJ: You call them sworn declarations?

8 ATC2: Yes, ma'am. They were sworn under penalty of perjury
9 pursuant to 28 U.S.C. § 1746. The defense and the government
10 differ on their interpretation of the IO's findings and what, in
11 fact, a statement under penalty of perjury is. The Investigating
12 Officer determined that it had the same indicia of reliability as a
13 sworn statement, and thus as § 1746 itself says it can be used--it
14 is used as a sworn statement except in particular circumstances,
15 none of which were met in this case.

16 MJ: All right. So it says that and it is entitled an unsworn
17 declaration under penalty of perjury?

18 ATC2: Yes, ma'am.

19 MJ: And it may be used with like force and effect?

20 ATC2: Yes, ma'am. It says whenever any matter is required or
21 permitted to be supported, evidenced, established, or proved by a
22 sworn declaration in writing of the person making the same such
23 matter may with like force and effect be supported, evidenced,
24 established, or proved by an unsworn declaration or certificate

1 verification or a statement. So in other words a statement sworn
2 under 28 U.S.C. § 1746 is the same as a sworn statement. It is
3 sworn under penalty of perjury.

4 MJ: Okay. Government, anything else?

5 ATC2: It is also noteworthy and it is supported in the
6 enclosures submitted by the government in their motion that after
7 the Investigating Officer determined that these witnesses would not
8 be available, which was on 12 March, the government endeavored--and
9 before the Investigating Officer determined that he would consider
10 their sworn statements, the government endeavored to make these
11 witnesses available via telephonic testimony. In enclosure 27 you
12 will see the defense specifically objecting to telephonic
13 testimony. So he would have--defense would have had the
14 opportunity to cross-examine those witnesses had he not, you know,
15 potentially--the determination had not been made but potentially
16 had he not objected to the telephonic testimony and had they been
17 available.

18 MJ: All right. Talk to me about the last prong of the
19 defense request for depositions, the fact that you all impeded
20 access to their opportunity to contact these witnesses.

21 ATC2: In their witness request the defense had the contact
22 information for all but three of those witnesses they requested.
23 On February 1st, that was when defense told us that they may want
24 to call these people as witnesses. After that time the government

1 has endeavored to make arrangements for the defense to be in
2 contact with those individuals. As defense said it is a, you know,
3 it is a long process. We also don't have direct access to those
4 individuals. They are high ranking individuals in, you know, in
5 the civilian government and in the military. So coordination with
6 those individuals does take time. And the government had also
7 stated that, you know, initially the government stated that these
8 are not witnesses yet. You know, we haven't had a witness list
9 yet, which was the reason that the government was not giving the
10 contact information initially because these witnesses, they are not
11 witnesses by individual, they are witnesses by position. So
12 whatever individual is in that particular position at the time when
13 we are going to have a witness list due is going to be, you know,
14 and the individual that the organization or agency says is their,
15 you know, individual that will represent them for this purpose will
16 be the proper individual for the defense to contact.

17 MJ: Why would that preclude you from giving the defense
18 contact information?

19 ATC2: It doesn't preclude us from giving contact information.
20 The government, like I said, on 1 February when defense said, "We
21 want to contact these witnesses for ourselves." Then we said in
22 that case we will endeavor to get this contact information for you.
23 But for efficiency purposes, it makes sense for defense to have the
24 correct individual; the individual that will be testifying at

1 trial, to contact so they do have timely and meaningful access to
2 the relevant witness.

3 MJ: Well, government, if the defense asked for contact
4 information for these OCAs, whether or not they are going to be in
5 their position in the summer time, is the government going to give
6 them that contact information?

7 I don't mean personal cell phones, I mean business
8 phones.

9 ATC2: Yes, ma'am. The government will coordinate and get the
10 contact information for all relevant witnesses in a timely,
11 meaningful manner.

12 MJ: All right. What is the government's position on this
13 *Touhy* issue?

14 ATC2: I am going to defer to Captain Fein on the *Touhy* issue.
15 He is the one on all the emails and can provide the most relevant
16 information to those exchanges, Your Honor; if that's all right.

17 MJ: I'll ask him that question after you finish.

18 ATC2: Okay. Subject to your questions, ma'am.

19 MJ: I just asked them.

20 ATC2: Okay. Thank you, Your Honor.

21 MJ: Captain Fein, if you would, educate the Court on the
22 *Touhy* issue.

23 TC[MAJ FEIN]: Yes, ma'am. Ma'am, *Touhy*_regulations has cited
24 5 U.S.C. § 301 are housekeeping statutes. Each federal entity

1 establishes their own under the C.F.R., publishes it and it's the
2 rule. *Touhy* regulations are simply these housekeeping rules to
3 centralize decision making. In the normal military justice
4 process, *Touhy* does not typically show its face because we have our
5 own housekeeping rules under Army Regulation 27-40; which
6 specifically say for court-martial processes all government
7 officials are basically on notice and we do not have to follow some
8 special rule. Although that same regulation does not apply with
9 anyone outside the Department of Defense and the Department of the
10 Army need access. So similarly, ma'am, to the motion to compel
11 discovery we are dealing with entities and individuals outside the
12 control of military authorities.

13 MJ: So of all of the witnesses that have been requested for
14 depositions, the DOD witnesses, *Touhy* doesn't apply.

15 Is that correct?

16 TC[MAJ FEIN]: That is correct, ma'am.

17 MJ: Now which of these witnesses would that be?

18 TC[MAJ FEIN]: May I have a moment, ma'am.

19 [Trial counsel reviewed his materials.]

20 TC[MAJ FEIN]: Ma'am, they would--those that would be not
21 actually exempt, but that we would not have to follow some
22 additional housekeeping rule under their--under *Touhy* regulation
23 would be Rear Admiral Donegan, Mr. Betz, and Lieutenant General
24 Schmidle, Vice Admiral Harward, Rear Admiral Woods; the two

1 remaining OCAs, they do fall outside of military authorities. We
2 would have to follow the *Touhy* regulations but the important part
3 about *Touhy* regulations, ma'am, it is not a method for the
4 government to withhold or suppress evidence. It is simply a
5 housekeeping administrative rule that the government has assured
6 the defense that we will champion their effort for them but they
7 must submit a request. This is separate and apart, Your Honor,
8 from the judicial process. If you ordered discovery--excuse me.
9 If you ordered depositions, that judicial order falls within the
10 *Touhy* regulations and then that order is processed through those
11 agencies or departments in order to affect your order. Then they
12 follow their housekeeping rules in order to determine how to best
13 answer that order and whether there is a privilege they would
14 either want to invoke, need to invoke, or not; again, not in an
15 effort to suppress but if it there is not, they'll get the right
16 person unless--if it is a discovery request--excuse me. A
17 deposition request, if it is that individual, they are either going
18 to come back and say it is not the appropriate individual or it is,
19 but they follow their rules. So it is not to impede access. This
20 issue really came up when the defense asked to talk to these
21 individuals within their own capacity. Again, normal military
22 justice processes the defense wanting to talk to a Company
23 Commander. We as trial counsel help coordinate the Company

1 Commander, defense can go on their own to the Company Commander.

2 There is no prohibition.

3 MJ: Typically they ask the trial counsel, trial counsel goes
4 and makes the connection, and then of course, briefs the individual
5 that under Article 46 they need equal access and give them the
6 normal briefing. Because these individuals are outside military
7 authorities, that same process is done through the *Touhy*
8 regulation. So if the defense, on their own, is asking, they must
9 submit a request through the *Touhy* regulations. But again, the
10 prosecution, in this case, has said if that is the route they want
11 to go concurrent or exclusive from the depositions, we will help
12 them do that. We will submit it for them, they prepare the
13 request, we will submit it, we will track it through the government
14 agency and we will be a proponent for it; after they submit the
15 request. Trying to analogize to how we do a--to how we conduct
16 military justice in the military.

17 And that involves 2 witnesses, is that correct?

18 TC[MAJ FEIN]: Say again, ma'am?

19 MJ: That involves 2 witnesses?

20 TC[MAJ FEIN]: Two from the--not necessarily witnesses, ma'am.
21 It involves two of the proposed proponents.

22 MJ: Got it.

23 Okay, is there anything else from either side?

24 CDC[MR. COOMBS]: Nothing from the defense, Your Honor.

1 MJ: All right. Is there anything else we need to address
2 today? I'm going to take both of these issues under advisement. I
3 hope to have something for you tomorrow.

4 Is there anything else we need to take up before we
5 recess the court today?

6 TC[MAJ FEIN]: No, Your Honor.

7 CDC[MR. COOMBS]: No, Your Honor.

8 MJ: Looking at tomorrow, do the parties believe a 0900 start
9 time is a good start time or is there a preference?

10 I am just thinking of the things that we may need to work
11 through.

12 TC[MAJ FEIN]: Ma'am, may we have a moment?

13 MJ: Yes.

14 [Trial counsel team conferred.]

15 TC[MAJ FEIN]: Ma'am, based off there may be some--if there is
16 a potential for issues to come up this afternoon, do you mind
17 giving us some time tomorrow morning to sort those out. We
18 recommend 10 o'clock.

19 MJ: All right. I know there is a lot of people that have
20 been advised that it starts at 0900 tomorrow.

21 Is that going to pose any problems for either side?

22 TC[MAJ FEIN]: May we have a moment, ma'am?

23 MJ: Yes.

24 [Trial counsel team conferred.]

1 TC Ma'am, later is fine.

2 MJ: All right. Then we will recess the court and then we are
3 going to reconvene at 10 o'clock tomorrow.

4 Court is in recess.

5 [The Article 39(a) session recessed at 1548, 15 March 2012.]

6 [END OF PAGE]

1 [The Article 39(a) session was called to order at 1320, 16 March
2 2012.]

3 MJ: This Article 39(a) session is called to order.

4 Let the record reflect all parties present when the court
5 last recessed are again present in court.

6 As everyone can tell by the time, we got started a little
7 late today. A large part of that was that the parties and the
8 Court have spent a great deal of time going over an appropriate
9 protective order in this case for classified information. The
10 parties initially had filed each, on each side, motions regarding
11 the protective order.

12 Have those been marked as appellate exhibits?

13 CDC[MR. COOMBS]: Yes, Your Honor.

14 TC[MAJ FEIN]: Yes, Your Honor.

15 [The court reporter handed AEs IV, V, XIII, XVIII, XXII and XXIII
16 to the Military Judge.]

17 MJ: All right. I am looking at what's been marked as
18 Appellate Exhibit 4, which is a defense motion for appropriate
19 relief under M.R.E. 505; which is the Rule dealing with classified
20 information; and Appellate Exhibit 5, which is a prosecution motion
21 for a protective order. I believe there were supplemental motions
22 filed as well.

23 CDC[MR. COOMBS]: That is correct, Your Honor.

1 MJ: All right. I am looking at Appellate Exhibits 12, which
2 is the supplement to the defense motion for appropriate relief
3 under Military Rule of Evidence 505; Appellate Exhibit 13, which is
4 the supplement to the prosecution's motion for a protective order;
5 and Appellate Exhibit 20--excuse me. Let me rephrase that. That
6 is Appellate Exhibit 18 is the supplement to the prosecution motion
7 for protective order dated 8 March 2012; and Appellate Exhibit 23,
8 which is the defense reply to government motion for a protective
9 order.

10 Was there an additional government response to the
11 Military Rule of Evidence 505 motion by the defense?

12 TC[MAJ FEIN]: Yes, Your Honor. There is also some others
13 that go along with it, as well. The prosecution's--one moment,
14 please, Your Honor.

15 [Trial counsel reviewed his materials.]

16 MJ: I am looking at Appellate Exhibit 13, which is the
17 prosecution's response to defense motion for appropriate relief
18 under Military Rule of Evidence 505?

19 TC[MAJ FEIN]: Yes, ma'am. Then there is also--you've already
20 talked about Appellate Exhibit 22, which is the defense's
21 supplement to the defense motion for M.R.E. 505. But there is also
22 the Appellate Exhibit 28, which is the supplement to the
23 prosecution motion for a protective order.

24 MJ: I have Appellate Exhibit 28.

1 TC[MAJ FEIN]: Yes, ma'am.

2 MJ: All right. So there are four new filings.

3 Appellate Exhibit 28, the supplement to the prosecution
4 motion for a protective order;

5 Appellate Exhibit 13, the prosecution's response to
6 defense motion for appropriate relief under Military Rule of
7 Evidence 505;

8 The supplement to the defense motion for appropriate
9 relief under Military Rule of Evidence 505, Appellate Exhibit 22;
10 and

11 The defense reply to government motion for a protective
12 order, Appellate Exhibit 23.

13 Is that correct?

14 CDC[MR. COOMBS]: That is correct, Your Honor.

15 TC[MAJ FEIN]: Yes, ma'am.

16 MJ: All right.

17 As I said earlier, we have spent a good part of the day
18 going over all of these motions for protective orders, as well as
19 the protective orders that were proposed by both sides; and that
20 has taken a great part of the day. We have finalized a protective
21 order that I believe best balances the protection of classified
22 information for national security and the accused's right to a fair
23 trial.

1 Would either party like to say anything further for the
2 record with respect to the protective order?

3 CDC[MR. COOMBS]: No, Your Honor.

4 TC[MAJ FEIN]: No, Your Honor. Just the version to be marked.

5 MJ: All right. I need to sign it, right?

6 [The Military Judge signed AE 32.]

7 MJ: All right. That would be Appellate Exhibit 32.

8 All right. The other two outstanding things that we have
9 today are:

10 I have a ruling on the motion to compel depositions,
11 which I am prepared to announce for the court.

12 The motion to compel discovery. I have that under
13 advisement. The defense is submitting additional evidence for me
14 to consider with respect to that ruling.

15 MJ: So my plan is I am going to take that under advisement,
16 issue a ruling and send it via email to the parties, and then we
17 will address that in open court at the next session.

18 Anything further on that by the parties?

19 CDC[MR. COOMBS]: No, Your Honor.

20 TC[MAJ FEIN]: Other than, Your Honor, based off of what the
21 defense might submit, the government also might submit, I guess, a
22 rebuttal.

23 MJ: All right. And I will withhold the ruling until I
24 receive that evidence from both sides.

1 All right. Ruling, defense motion to compel depositions.

2 The defense moves this Court to compel oral depositions
3 prior to trial in accordance with R.C.M. 702(c)(2). The government
4 opposes. After considering the pleadings, evidence presented, and
5 argument of counsel, the Court finds and concludes as follows:

6 Background.

7 The defense moves the Court to order oral depositions of
8 the following individuals:

9 Captain James Kolky, 1st Cavalry Division, Fort Hood,
10 Texas, Brigade S-2. The defense proffers he will testify about his
11 classification review of the three Apache gun videos that were sent
12 to his division by FORSCOM.

13 Specifically, he will testify that the videos were not
14 classified at the time of their alleged release. However, he will
15 testify that he believes that videos should have been classified.
16 He will also testify regarding his classification determination.

17 Rear Admiral Kevin M. Donegan, Director of Operations for
18 the United States Central Command. The defense proffers that Rear
19 Admiral Donegan conducted classification reviews of two PowerPoint
20 slide presentations of official reports originated by U.S. CENTCOM.
21 The PowerPoint presentations are the subject of Specification 10 of
22 Charge II. Rear Admiral Donegan will testify regarding his
23 classification determination and his belief of the impact on
24 national security due to the release of the information.

1 Robert E. Betz, U.S. CYBERCOM, Chief, Classification
2 Advisory Officer. The defense proffered that the government had
3 not provided contact information for Mr. Betz; and the defense
4 proffers that he will testify about his classification
5 determination concerning the alleged chat logs between Mr. Lamo and
6 PFC Bradley Manning. Specifically, he will testify about his
7 classification assessment of information discussed in the alleged
8 chat logs.

9 Lieutenant General Robert E. Schmidle, Jr., Deputy
10 Commander U.S. Cyber Command. He is the original classification
11 authority over the information discussed by Mr. Betz. The defense
12 proffers Lieutenant General Schmidle will testify that he concurs
13 with the classification determination and impact statements made by
14 Mr. Betz. The defense would like to question him regarding his
15 declaration and the basis for his belief.

16 MJ: Vice Admiral Robert S. Harward, U.S. CENTCOM Deputy
17 Commander, MacDill Air Force Base, Florida. The defense proffers
18 Vice Admiral Harward will testify concerning his classification
19 review and classification determination concerning the CIDNE-
20 Afghanistan events, CIDNE-Iraq events, other briefings and the
21 BE22PAX.wmv video. Specifically, Vice Admiral Harward would
22 testify concerning his classification determination and his belief
23 of the impact on national security from having this information
24 released to the public.

Patrick F. Kennedy, Under Secretary of State for Management. The defense proffers that government has not provided contact information for Mr. Kennedy; that Mr. Kennedy would testify concerning his review of the disclosure of Department of State Diplomatic Cables stored within the net centric diplomacy server and part of SIPDIS. Mr. Kennedy will testify concerning his classification determination and the impact of the release of the information on national security.

Rear Admiral David B. Woods, Commander, Joint Task Force, Guantanamo.

The defense proffers that Rear Admiral Woods would testify concerning his review of the disclosure of five documents, totaling 22 pages. Rear Admiral Woods would testify concerning his classification determination and his belief regarding the impact of the release of the information on national security.

Mr. Robert Roland. The defense proffers that the government has not provided contact information for Mr. Roland.

Two, the defense argues the requested depositions of Mr. Kolky and Mr. Roland are needed because the witnesses were essential witnesses and should have been produced in person at the Article 32 hearing. An additional ground for the remaining depositions is that the Article 32 Investigating Officer improperly determined that the witnesses were not reasonably available at the Article 32 hearing. The witnesses were essential witnesses and

1 should have been produced in person at the Article 32 hearing.
2 Defense further argues that the depositions are necessary because
3 the government impeded defense access to interview the witnesses.

4 Factual Findings.

5 The Court adopts the following factual findings as
6 stipulated to by the parties:

7 One, PFC Manning is charged with five specifications of
8 violating a lawful general regulation, one specification of aiding
9 the enemy, one specification of disorders and neglects to the
10 prejudice of good order and discipline and service discrediting,
11 eight specifications of communicating classified information, five
12 specifications of stealing or knowingly converting Government
13 property, and two specifications of knowingly exceeding authorized
14 access to a Government computer, in violation of Articles 92, 104,
15 and 134, UCMJ, 10 U.S.C. Section 892, 904, 934 (2010).

16 Two, the original charges were preferred on 5 July 2010.
17 Those charges were dismissed by the Convening Authority on 18 March
18 2011. The current charges were preferred on 1 March 2011. On 16
19 December through 22 December 2011, these charges were investigated
20 by an Article 32 Investigating Officer and the charges were
21 referred without special instructions to a General Court-Martial on
22 3 February 2012.

23 Three, the defense requested the OCAs' classification
24 determinations during discovery on 15 November 2010. On or about

1 November 2011 the defense had all of the OCA classification
2 determinations.

3 Four, on 2 December 2011, the defense submitted its
4 witness list to the Article 32 Investigating Officer, naming the
5 seven OCAs. The witness list did not include Mr. Roland.

6 On 7 December, the government responded to the defense's
7 witness list. The government objected that Captain Kolky was not
8 relevant. The government requested the IO to find each OCA not
9 reasonably available for the Article 32 given his duty position
10 because of the difficulty, delay, and effect on military operations
11 outweighed the significance of his testimony under Rule for Courts-
12 Martial 405(g)(1)(B). On 8 December 2011, the defense challenged
13 the government's position that the OCAs were not reasonably
14 available. On 14 December 2011, the IO made his determinations
15 regarding defense requested witnesses. In relevant part, the IO
16 found Captain Kolky not relevant to the form of the charges, the
17 truth of the charges or information as may be necessary to make an
18 informed recommendation as to disposition. Specifically, whether
19 three Apache gun videos that were sent to his division were not
20 classified at the time of their alleged release and whether they
21 should have been. Recognizing that the government states the video
22 is not classified and doesn't allege it is classified, is not
23 relevant to a determination as to whether PFC Manning committed the

1 charged offenses and, if so, what that disposition of those charges
2 should be.

3 Rear Admiral Donegan not reasonably available because
4 while his testimony is relevant, he is located in Florida and is
5 the CENTCOM's Director for Operations.

6 The significance of his expected testimony with respect
7 to his classification determinations concerning the two PowerPoints
8 at issue does not outweigh the difficulty, expense, and effect on
9 military operations of obtaining his presence in the investigation.

10 Mr. Betz not reasonably available because while his
11 testimony is relevant, he is CYBERCOM's Chief Classification
12 Advisory Officer. The significance of his expected testimony with
13 respect to his classification determinations concerning the alleged
14 chat logs between Mr. Lamo and PFC Manning does not outweigh the
15 difficulty, expense, and effect on military operations of obtaining
16 his presence in the investigation.

17 Lieutenant General Schmidle not reasonably available
18 because while his testimony is relevant, he is CYBERCOM's Deputy
19 Commander. The significance of his expected testimony with respect
20 to his classification determinations concerning the alleged chat
21 logs between Mr. Lamo and PFC Manning does not outweigh the
22 difficulty, expense, and effect on military operations of obtaining
23 his presence in the investigation.

1 Vice Admiral Harward not reasonably available because
2 while his testimony is relevant, he is located in Florida and is
3 CENTCOM's Deputy Commander. The significance of his expected
4 testimony with respect to his classification determinations
5 concerning the CIDNE-Afghanistan events, CIDNE-Iraq events, other
6 briefings, and the BE22PAX.wmv video does not outweigh the
7 difficulty, expense, and effect on military operations of obtaining
8 his presence in the investigation.

9 Mr. Kennedy not reasonably available because while his
10 testimony is relevant, he is the Under Secretary of State for
11 Management. The significance of his expected testimony with
12 respect to his classification determinations concerning Diplomatic
13 State cables does not outweigh the difficulty, expense, and effect
14 on military operations of obtaining his presence in the
15 investigation.

16 Rear Admiral Woods not reasonably available because while
17 his testimony is relevant, he is Commander of the Joint Task Force,
18 Guantanamo. The significance of his expected testimony with
19 respect to his classification determinations concerning the
20 documents at issue does not outweigh the difficulty, expense, and
21 effect on military operations of obtaining his presence in the
22 investigation.

23 Six, the defense also objected to the IO considering the
24 OCA affidavits submitted in accordance with 28 U.S.C. Section 1746.

1 Seven, while the IO was pondering whether to consider the
2 OCA affidavits, the government offered to have the OCA testify
3 telephonically. The defense objected to telephonic testimony.

4 Eight, on 23 January 2012, the defense filed a request
5 for oral deposition with the General Court-Martial Convening
6 Authority. On 1 February 2012, the General Court-Martial Convening
7 Authority denied the defense's request finding the IO did not
8 improperly determine that the witnesses were not reasonably
9 available and because there is no evidence that the witnesses will
10 be unavailable for trial if found relevant and necessary.

11 Nine, on 20 January 2012, the defense filed a discovery
12 request asking for complete contact information for three OCAs. On
13 27 January 2012, the government responded that it would not provide
14 contact information for the OCAs because they were not government
15 witnesses but if they became government witnesses, the government
16 would assist in coordinating meetings for defense interviews.

17 Ten, on 1 February 2012, the defense advised the
18 government of its intent to explore calling the OCAs as witnesses
19 and asked for contact information. On 1 February 2012, the
20 government advised the defense it would provide contact information
21 and start working with each organization to determine the best way
22 for the defense to contact them. On 29 February 2012 the
23 government has provided contact information for Mr. Betz.

Eleven, the government advised the Court that for the 2 non-DOD OCA, the defense may have to file a request with the agency 3 to interview the OCA IAW what is called *Touhy* regulations 4 promulgated in accordance with 5 United States Code Section 301. 5 Defense disputes that *Touhy* applies when the United States is a 6 party, citing *Alexander v. Federal Bureau of Investigation, 186* 7 *F.R.D. 66 (D.D.C. 1998)*. The government offered to assist the 8 defense in contacting the OCA and in the *Touhy* process, if 9 applicable.

The Law.

One, Article 49, UCMJ and Rule for Courts-Martial 702 12 govern depositions in courts-martial. R.C.M. 702 provides that a 13 deposition may be ordered whenever, after preferral of charges, due 14 to exceptional circumstances of the case, it is in the interest of 15 justice that the testimony of a prospective witness be taken and 16 preserved for use at an Article 32 investigation or for trial.

Two, the purpose of a deposition is to preserve the 17 testimony of an unavailable witness. Article 49(d) and analysis to 18 Rule for Courts-Martial 702(a).

Three, both Article 49 and R.C.M. 702 states that a 20 request for deposition may be denied only for good cause.

The discussion of the Rule provides that the fact that a 22 witness is or will be available for trial is good cause in the 23 absence of unusual circumstances, such as the improper denial of a 24

1 witness request at an Article 32 hearing, unavailability of an
2 essential witness at an Article 32 hearing, or when the Government
3 has improperly impeded defense access to a witness. For the
4 record, that would be the discussion of R.C.M. 702, say that.

5 Four, R.C.M. 405(g)(1)(a) and (g)(2)(a) provide that a
6 relevant witness, to include a witness who is timely requested by
7 the accused and is not cumulative shall be produced if reasonably
8 available. The investigating officer at an Article 32
9 investigation determines whether a requested relevant witness is
10 reasonably available. A witness is reasonably available when the
11 witness is located within 100 miles of the site of the
12 investigation and the significance of the testimony and personal
13 appearance of the witness outweighs the difficulty, expense, delay,
14 and effect on military operations of obtaining the witness'
15 appearance.

16 Five, R.C.M. 405(g)(4)(b) provides in relevant part that
17 the Article 32 IO can consider sworn statements over the objection
18 of the defense if the witness is not reasonably available.

19 R.C.M. 405 does not provide authority for the IO to
20 consider unsworn statements over the objection of the defense if
21 the witness is not reasonably available.

22 Six, 28 United States Code Section 1746 provides in
23 relevant part, whenever, under any law of the United States or
24 under any rule, regulation, order, or requirement made pursuant to

law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same, such matter may, with like force and effect be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him as true under penalty of perjury, and dated in substantially the following form:

One, if executed without the United States: "I declare or certify, verify, or state under penalty of perjury under the laws of the United States of America that the foregoing is true and correct." Executed on date.

Two, if executed within the United States, its territories, possessions, or commonwealths: "I declare or certify, verify, or state that under penalty of perjury that the foregoing is true and correct." Executed on (date).

Seven, R.C.M. 405(g)(4)(B) is a law of the United States for purposes of 28 United States Code Section 1746 that allows proof of a matter by sworn statement. An Article 32 IO may consider an affidavit filed IAW 28 United States Code Section 1746 to the same extent he or she considers a sworn statement.

Unsworn declarations under 28 United States Code Section 1746 are elevated to the level of sworn statements because they subject the declarant to the penalties of perjury under the United

1 States Code and false swearing under Article 134, of the Uniform
2 Code of Military Justice.

3 Eight, a witness has no obligation to submit to a
4 pretrial interview. *United States v. Morgan*, 24 MJ 93 Court of
5 Military Appeals, (1987). The government may not induce a witness
6 to refuse to answer questions of defense counsel. *United States v.*
7 *Killebrew*, 9 MJ 154, Court of Military Appeals (1980).

8 Analysis.

9 One, the IO's determination regarding the requested
10 defense witnesses was not an improper denial. The IO properly
11 balanced the significance of each witness' testimony against the
12 difficulty, expense, and effect on military operations of obtaining
13 that presence in the investigation.

14 Two, the IO properly considered the OCA affidavits in
15 accordance with 28 United States Code Section 1746.

16 This statute provides that such affidavits may be used as
17 proof under any law of the United States where any matter is
18 required or permitted to be proved by sworn statement. R.C.M.
19 405(g)(4)(b) is such a law.

20 Three, military cases addressing depositions as a remedy
21 for an Article 32 investigation where the IO improperly denied
22 production of an essential witness have been provided in cases
23 where the witness is a key witness providing the only direct
24 evidence of a crime or a person is the victim of a sexual assault.

1 Unlike such witnesses, the OCA providing the classification reviews
2 are not essential witnesses.

3 Four, the government has not impeded the defense's access
4 to the OCAs. Recognizing the challenges of coordinating interviews
5 with government witnesses in high level positions, the government
6 has volunteered to assist the defense in coordinating interviews
7 and in any applicable *Touhy* process.

8 Five, there is no evidence that any of the witnesses will
9 be unavailable for trial should they be deemed relevant and
10 necessary.

11 Six, there is good cause to deny the request for
12 depositions for all of the witnesses.

13 The ruling. The defense motion to compel depositions is
14 denied.

15 Does either side have anything else with respect to this
16 motion?

17 CDC[MR. COOMBS]: No, Your Honor.

18 TC[MAJ FEIN]: No, ma'am.

19 MJ: All right. For the record, counsel and I met in
20 chambers. In addition to the protective order meeting to discuss
21 the way ahead for the next proceeding. What we will do is the next
22 proceedings will be held the 24th of April through the 26th of
23 April. They will start, once again, at 0900. One thing we have
24 learned from this proceeding today is it is going to be better to

1 make these proceedings 3-day proceedings as opposed to 2-day
2 proceedings for the amount that we need to accomplish.

3 The subject matter of what will be litigated during those
4 dates at this point is not firm. The parties are going to submit
5 to me what they propose to be litigated at the next session. Once
6 we finalize that, I believe the parties are prepared to announce to
7 the public what that litigation will be.

8 Is that correct?

9 TC[MAJ FEIN]: Yes, Your Honor.

10 CDC[MR. COOMBS]: Yes, Your Honor.

11 MJ: Okay. Is there anything else that we need to address
12 before we recess the court today?

13 CDC[MR. COOMBS]: No, Your Honor.

14 TC[MAJ FEIN]: No, Your Honor.

15 MJ: All right. Court is in recess.

16 [The Article 39(a) session recessed at 1346, 16 March 2012.]

17 [Pursuant to CAAF Order, dated 24 July 2012, pages 222 through 242
18 were authenticated by the Military Judge on 2 August 2012 and filed
19 with CAAF on 3 August 2012 (see USCA Dkt. No. 12-8027/AR; Crim.App.
20 Dkt. No. 20120514). Pages 222 through 242 also contain the
21 original page numbers of the previously authenticated transcript
22 and those numbers are lined through.]

23 [END OF PAGE.]

United States Court of Appeals
for the Armed Forces
Washington, D.C.

Center for Constitutional, Rights, et al,)	USCA Dkt. No. 12-8027/AR
)	Crim.App. Dkt. No. 20120514
Appellants)	
)	
v.)	<u>O R D E R</u>
)	
United States,)	
)	
and)	
)	
Colonel Denise Lind,)	
Military Judge,)	
Appellees)	

On consideration of the writ-appeal petition for review of the decision of the United States Army Court of Criminal Appeals on application for extraordinary relief, in which Appellants have requested an order for public access to all documents and information filed in the case of United States v. Private First Class Bradley Manning, including the docket sheet, all motions and responses thereto, all rulings and orders, and verbatim transcripts or other recordings of all conferences and hearings before the court-martial, it is, by the Court, this 24th day of July, 2012,

ORDERED:

That the Government file with this Court the ruling and analysis of the military judge regarding the request for the above-referenced matters, either in the form of an appellate exhibit or in the transcript of an Article 39(a), UCMJ, session of the court-martial;

That the Government file with this Court the motion and response, if any, regarding the above-referenced request and, should the Government believe such matters should be filed under seal, file such matters under seal and indicate why they should be filed with this Court under seal;

That the Government serve a copy of all matters filed with this Court upon counsel for the accused, Private First Class Bradley Manning, unless such matters are filed under seal;

That the Government file such matters with this Court on or before August 10, 2012; and

That Appellants and counsel for the accused may file a response to such matters on or before August 24, 2012.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (KADIDAL, Esq.)
Appellate Government Counsel (FISHER)

1 [The Article 39(a) session was called to order at 1007, 24 April
2 2012.]

3 MJ: Please be seated.

4 This Article 39(a) session is called to order.

5 Trial counsel, please account for parties?

6 TC: Your Honor, all present, all previous parties are present
7 with the following exceptions:

8 Captain Overgaard is no longer sitting at the prosecution
9 table. Captain Whyte is and his credentials already have been
10 previously put on the record.

11 For the defense also, also Captain Tooman is present and
12 Captain Bouchard is no longer present.

13 MJ: Now was Major Kemkes at the last session?

14 TC: He was not, ma'am.

15 MJ: Okay.

16 Let us begin with the defense counsel issue.

17 Now, PFC Manning, do you remember at the arraignment I
18 advised you of your rights to counsel?

19 ACC: Yes, Your Honor.

20 MJ: All right. At that time I advised you that you have the
21 right to be represented by your then detailed defense counsel, who
22 were Major Kemkes and Captain Bouchard.

23

24

1 MJ: They were lawyers certified by the Judge Advocate General
2 as qualified to act as your defense counsel and that they were
3 members of the United States Army's Trial Defense Service. Their
4 services were provided at no expense to you. I also advised you
5 that you have the right to be represented by military counsel of
6 your own selection provided that the counsel you request is
7 reasonably available. If you're represented by military counsel of
8 your own selection then your detailed defense counsel would
9 normally be excused. However, you could request that your detailed
10 defense counsel continue to represent you, but that request would
11 not have to be granted.

12 In addition to your military defense counsel, you have
13 the right to be represented by civilian counsel at no expense to
14 the government. Civilian counsel may represent you along with your
15 military defense counsel; or you could excuse your military defense
16 counsel and be represented solely by your civilian counsel. At the
17 arraignment you advised me that you wish to be represent by Mr.
18 Coombs, and by Major Kemkes, and Captain Bouchard.

19 Do you remember that discussion?

20 ACC: Yes, Your Honor.

21 MJ: All right. I'm looking at Appellate Exhibit LXI, which
22 is a Memorandum for Record, dated 13 April 2012 signed by you, PFC
23 Manning.
24

1 MJ: It states:

2 One, I've thoroughly discussed my options regarding my
3 detailed military counsel with Mr. Coombs. We have spoken about
4 the advantages and disadvantages of retaining my detailed counsel,
5 Major Matthew Kemkes and Captain Paul Bouchard, on my case. I
6 elect to excuse my detailed counsel, Major Kemkes and Captain
7 Bouchard; and I request that Major Joshua Tooman be detailed to my
8 case at my military counsel. I do not request any other defense
9 counsel be detailed to my case at this time.

10 Now did you write this memorandum?

11 ACC: I did. Yes, Your Honor. Yes.

12 MJ: And did you sign it?

13 ACC: Yes, Your Honor.

14 MJ: So do you consent then to having, basically, Major Kemkes
15 and Captain Bouchard being replaced as detailed defense counsel by
16 Captain Tooman?

17 ACC: That is correct, Your Honor.

18 MJ: All right. Mr. Coombs, do you also agree that you've
19 advised PFC Manning and that you concur in this decision?

20 CDC: Yes, Your Honor.

21 MJ: All right. The Court then finds that this is an
22 appropriate change in defense counsel under Rule for Courts-Martial
23 505(d)(2)(b)(2) and R.C.M. 506(c).

1 MJ: Captain Tooman, please announce your detailing
2 qualifications for the record.

3 DC: Your Honor, I have been detailed to the court-martial by
4 Lieutenant Colonel Douglas Watkins, the Regional Defense Counsel of
5 the Great Plains Region, United States Army Trial Defense Service.
6 I am qualified and certified under the Article 27(b) and sworn
7 under Article 42(a) of the Uniform Code of Military Justice. I
8 have not acted in any manner which might tend to disqualify me in
9 this court-martial.

10 MJ: All right. Thank you.

11 All right, I would like to begin by going over some
12 issues that have arisen since our last session. Today we will be
13 going over basically those housekeeping issues; as well as
14 addressing discovery issues that have been raised by the parties.

15 May I see the Security Officer Order, please?
16 [The court reporter handed the Military Judge AE XXXIV.]

17 MJ: All right. After the last session the government
18 proposed an order to Court Security Officers and detailed security
19 experts. The defense had no objections to it. So the Court has
20 signed the order to the security experts.

21 [END OF PAGE.]

1 MJ: It basically states:

2 The matter comes before the Court upon Protective Order
3 on 16 March 2012 to prevent the unauthorized disclosure or
4 dissemination of classified national security information which
5 will be reviewed by, or made available to, or is otherwise in the
6 possession of the accused and the parties to this case. The Court
7 finds that this case will involve information that has been
8 classified in the interest of national security. The storage,
9 handling, and control of this information will require special
10 security procedures mandated by statute, Executive Order, and
11 regulation, and access to which requires the appropriate security
12 clearances and "need to know". Under Executive Order 13526, "need
13 to know" means a determination within the executive branch in
14 accordance with the directives issued pursuant to this order that a
15 prospective recipient requires access to specified classified
16 information in order to perform or assist in a lawful and
17 authorized governmental function.

18 Three, pursuant to the authority granted under the
19 Military Rule of Evidence 505, the general supervisory authority of
20 the Court, and in order to protect the national security, it is
21 hereby ordered that:

22 A - Definitions. All definitions in the Protective Order
23 that was already entered shall apply;

1 MJ: B - Court Security Officer. Mr. Jay Prather, shall serve
2 as the Court's Security Officer for supervising security
3 arrangements necessary to protect from authorized disclosure any
4 classified documents or information submitted or made available to
5 the Court in connection with the above referenced court-martial.

6 One, the defense may request to disclose classified
7 information to recipients not authorized pursuant to the Protective
8 Order, subject to the approval of the United States or the Court.
9 If such request is approved, the Court Security Officer shall
10 verify that the intended recipients of the classified information
11 hold the required security clearance, signed a Memorandum of
12 Understanding at Appendix 'A' of the Protective Order, and have a
13 need to know. The Court Security Officer may request the
14 assistance of trial counsel to verify whether the intended
15 recipients hold the required security clearance. The Court
16 Security Officer shall promptly notify the United States and the
17 Court whether such intended recipients of classified information
18 satisfy these three requirements.

19 Two, the Court Security Officer shall accept receipt of
20 any pleading, document, or other substantive communication filed by
21 either party that contains classified information or information
22 reasonably believed to be classified, if required.

1 MJ: Three, the Court Security Officer shall promptly examine
2 any proceeding or other documents filed by either party that
3 contains classified information or information reasonably believed
4 to be classified to determine any question of derivative
5 classification or any other matter that could be reasonably be
6 believed to relate to classified information, but is not authorized
7 to make classification determinations; that is, whether information
8 is properly classified and verify whether the proceeding or
9 document contains classified information and is properly marked.

10 Four, the Court Security Officer shall promptly deliver
11 to the Court and opposing party any filing by either party that
12 contains classified information, except for any *ex-parte* filing
13 which shall be delivered only to the Court, absent Court approval.

14 Five, the Court Security Officer shall promptly notify
15 the prosecution, as the command's representative, over SIPRNET or
16 by other approved means under Army Regulation 380-5 of any spillage
17 of classified information.

18 C - Security Experts. Detailed security experts shall
19 provide advice to their respective party concerning procedures
20 governing the appropriate storage, handling, and transmittal of
21 classified documents and information, pursuant to the Protective
22 Order and applicable regulations and federal law.

23

1 MJ: Detailed security experts shall also provide their
2 respective party with procedures for preparing any document,
3 pleading, and substantive communication that contains classified
4 information or information reasonably believed to be classified.

5 Detailed security experts should be consulted by the
6 defense and prosecution regarding any question of derivative
7 classification or any other matter that could reasonably be
8 believed to relate to classified information, but are not
9 authorized to make classification determinations; that is, whether
10 information is properly classified.

11 One, a detailed security expert shall review, in-person
12 or over SIPRNET, while in a government facility approved for
13 classified information processing, any pleading, document or
14 subject of communication, including all attachments and enclosures
15 thereto, which contains classified information or information
16 reasonably believed to be classified, whether by original,
17 derivative, or compilation, and verify whether the pleading or
18 document contains classified information and is properly marked.

19 Two, a security expert detailed to the defense shall be
20 present at all times that the defense intends to disclose or elicit
21 classified information under paragraph 3(L)(6) of the Protective
22 Order and shall promptly terminate any conversation whenever the
23 defense elicits or attempts to elicit classified information not
24 previously approved for disclosure by the United States or the

1 Court, or whenever the intended recipient discloses classified
2 information for which the defense has no need to know.

3 MJ: Three, if requested by the defense, a security expert
4 detailed to the defense shall promptly and properly deliver any
5 pleading or document filed by the defense to the Court Security
6 Officer and the prosecution, except for any *ex-parte* filing which
7 shall be delivered only to the Court or to the Court Security
8 Officer.

9 Four, detailed security experts to the defense shall
10 properly destroy, by means approved for classified information
11 destruction, any documents requested by the defense, in the
12 presence of the defense.

13 Five, detailed security experts to the defense shall
14 promptly notify the Court Security Officer, over SIPRNET, or by
15 other approved means under Army Regulation 380-5 of any spillage of
16 classified information.

17 D - Communications. Any communications related to this
18 case, including internal communications between members of the
19 prosecution or defense; and communications between the parties, the
20 Court, and the Court Security Officer that contains classified
21 information or information reasonably believed to be classified
22 shall not be transmitted over any standard commercial telephone
23 instrument or office intercommunication system, including but not
24 limited to the internet.

1 MJ: Any communication related to this case, including
2 internal communications between members of the prosecution or the
3 defense and communications between the parties, the Court, and the
4 Court Security Officer that contains classified information or
5 information reasonably believed to be classified shall be
6 transmitted over SIPRNET or by other approved means under Army
7 Regulation 380-5.

8 Further ordered, the procedures set forth in this order
9 may be modified by further order of the Court acting under Military
10 Rule of Evidence 505 and the Court's inherent supervisory authority
11 to ensure fair and expeditious trial.

12 Five, Army Regulation 380-5, no procedure in this order
13 shall operate to supersede, or cause a violation of any provision
14 of Army Regulation 380-5.

15 So ordered this 22nd day of March 2012.

16 Does either side have anything further to address with
17 respect to the Court's Security Order?

18 TC: No, Your Honor.

19 CDC: No, Your Honor.

20 MJ: All right. I was also advised after the proceedings
21 yesterday that the--may I see the *Amicus* Order, please?
22 [The court reporter handed AE XXXV to the Military Judge.]
23

1 MJ: That there may be non-parties who wish to file *Amicus*
2 Briefs, which are called 'Friend of the Court Briefs' with the
3 Court. Based on that information, the Court has made the following
4 ruling with respect to *Amicus Curiae* filings, dated 23 March 2012.

5 The Court has been advised that there may be non-parties
6 who will move the Court for leave to file an *Amicus Curiae* brief.

7 The Court will not grant leave for a non-party to file an
8 *Amicus* brief. The government or the defense may attach such a
9 filing by a non-party as part of the brief filed within the
10 suspense dates set by the Court.

11 MJ: Does either side have anything to address further with
12 respect to *Amicus* filings?

13 CDC: No, Your Honor.

14 TC: No, Your Honor.

15 MJ: Okay.

16 May I see the Interim Order, please.

17 [The court reporter handed AE XXXIX to the Military Judge.]

18 MJ: All right. After the last session the defense advised
19 the Court--apparently I understand the defense has a website of
20 some kind?

21 CDC: Yes, ma'am.

22 MJ: All right. The defense advised the Court that the
23 defense wishes to file its motions on the website that the defense
24 has.

1 MJ: Would you like to describe for the record what you
2 advised the Court you wanted to do?

3 CDC: Yes, ma'am.

4 The defense simply requested to be allowed to present
5 redacted portions of their motions on our blog. Basically, the
6 *Army Court-Martial Defense Blog* in order for the public to have
7 access to this information. One of the common criticisms that has
8 been launched so far against this case is that it has not been
9 sufficiently public and that the public has not had the access to
10 the court filings by both of the parties. Both the Center for
11 Constitutional Rights and also the Reporters Committee on Freedom
12 of the Press has requested to have access to the court filings.
13 The defense does not see any need to deny that request. So we have
14 asked both from the Court and basically with negotiations with the
15 government to allow us to have our defense motions posted. We've
16 offered to post also the government's response motions and their
17 motions and they declined that offer. However, with their
18 redactions, the government, now under our agreement, can look at
19 our motions and indicate what areas of the motions need to be
20 redacted. The defense will comply with that request and only until
21 the government is satisfied, will the defense then post its motions
22 on our webpage.

23 MJ: All right.

24

1 MJ: Government, you initially objected to that procedure.

2 Is that correct?

3 TC: Yes, Your Honor.

4 MJ: Okay. Now what is the government's current position?

5 TC: Your Honor, the government's current position is we still
6 object overall to the procedure but as the defense submits their
7 proposed redactions we will review them and we will comply with the
8 Court's order on having the information reviewed; and if there are
9 any additional Protective Orders to request then ultimately the
10 government needs to ensure it protects essential witnesses,
11 individuals, and any information that is subject to the Court's
12 Protective Orders.

13 MJ: All right. The parties and I had a telephonic R.C.M. 802
14 conference on this issue. Once again, what an R.C.M. 802
15 conference is where I talk to the parties about logistics and other
16 issues that arise in cases; and then at the next session the
17 parties and I put what was discussed on the record. In this case,
18 the Court heard both sides and arrived at an Interim Order which
19 was signed on 28 March 2012. What that order says is:

20 One, at an R.C.M. 802 conference after the Article 39(a)
21 session on 16 March 2012, the defense advised the government and
22 the Court of its intent to publish without enclosures, defense
23 filings and proposed filings with the Court on the internet.

1 MJ: The government, via email dated 23 March 2012, 1733

2 [hours], advised the Court that the government opposes internet
3 publication of such defense filings.

4 The government further requested that prior to any
5 internet publication of a Court filing or proposed filing by the
6 defense, the government have:

7 One, an opportunity to file a motion for a Protective
8 Order or multiple Protective Orders under Rule for Courts-Martial
9 701(g) and Rule for Courts-Martial 806(d); and

10 Two, 30 days to receive input from all different federal
11 entities on what discovery information such agencies did not intend
12 to be publicly available.

13 Two, the defense, via email dated 23 March 2012 at 1745
14 and 1803 [hours] advised the government of its intent to publish on
15 the internet all previous defense filings with the Court without
16 enclosures and proposed defense filings for the next Article 39(a)
17 session; 24 through 26 April 2012, unless subject to a Protective
18 Order by the Court. The emails are attached as Attachment 'A'.

19 Three, a pleading is "filed" with the Court when it is
20 identified as an exhibit on the record at an Article 39(a) session.
21 Pleadings served on the opposing party that have not been
22 identified on the record at an Article 39(a) session are "proposed
23 filings".

1 MJ: Four, the Interim Order is issued in accordance with
2 Military Rule of Evidence 505(g) and (h); Military Rule of Evidence
3 506(g) and (h); Rule for Courts-Martial 701(g); and Rule for
4 Courts-Martial 806(d); and Seattle Times v. Rhinehart, 104 Supreme
5 Court 2199 (1984). This Interim Order provides procedures for the
6 government to request Protective Orders prior to any public release
7 of defense Court filings or proposed filings.

8 The Court finds this Interim Order necessary under the
9 above authorities. The government has provided the defense both
10 classified information and government information subject to
11 Protective Order under Military Rule of Evidence 505(g) (1) and
12 Military Rule of Evidence 506(g).

13 This Court has issued a Protective Order for classified
14 information provided to the defense in discovery. The defense has
15 accepted such discovery and agreed to comply with the Protective
16 Orders. There have been two classified information spillage
17 incidents to date in this case.

18 Five, this Interim Order applies to all previous Court
19 filings and any pleadings proposed for Court filing during the
20 Article 39(a) session currently scheduled to be held on 24 through
21 26 April 2012.

22

1 MJ: Interim Order.

2 One, the government's request to file a motion for a
3 Protective Order or multiple Protective Orders prior to public
4 release of defense Court filings or proposed Court filings is
5 granted as provided below.

6 Two, the defense will notify the government of each
7 defense Court filing or proposed filing intended for public
8 release. The defense will provide the government with the original
9 filing and the redacted filing intended for public release.

10 Three, government motions for Protective Order will:

11 A - Address each defense Court filing or proposed Court
12 filing individually and identify, with particularity, each portion
13 of the filing to which the government objects to public release and
14 the legal basis for each objection to public release.

15 B - Provide proposed findings of fact for the Court with
16 respect to each portion of each filing to which the government
17 objects to public release.

18 Four, suspense dates for defense filings and proposed
19 filings the defense intends to publicly release; and the Court in
20 the order sets suspense dates that have already passed.

21 [END OF PAGE.]

1 MJ: Five, the defense will not publicly release any defense
2 appellate exhibit or proposed filing with the Court to which the
3 government objects until after the government motions for
4 Protective Order are addressed at the Article 39(a) session 24
5 through 26 April 2012.

6 Six, the defense will not disclose any information known
7 or believed to be subject to a claim of privilege under Military
8 Rule of Evidence 505 or Military Rule of Evidence 506 without
9 specific Court authorization. Prior to any disclosure of
10 classified information, the defense will provide notice under
11 Military Rule of Evidence 505(h) and follow the procedures under
12 that Rule.

13 Seven, personal identifying information, P-I-I, will be
14 redacted from all defense filings publicly released. P-I-I
15 includes personal addresses, telephone numbers, email addresses,
16 first five digits of social security numbers, dates of birth,
17 financial account numbers, and the names of minors.

18 Eight, to protect the safety of potential witnesses all
19 persons who are not parties to the trial shall be referenced by
20 initials of first and last name in any defense filing publicly
21 released.

22

1 MJ: Nine, for future defense filings with the Court where the
2 government moves for a Protective Order preventing public release,
3 the Court proposes the procedures in the draft Protective Order at
4 Attachment 'C'. Objections to the proposed procedures will be
5 addressed at the Article 39(a) session.

6 Counsel and I met in chambers briefly before coming on
7 the record today. I had asked the counsel if they had any
8 objections to the draft Protective Order, which in essence just
9 sets future time lines and is, in substance, pretty much the same
10 as the Interim Order that I just read.

11 Do the parties have any objections to the draft----

12 TC: No, Your Honor.

13 MJ: ----Protective Order?

14 CDC: No, Your Honor.

15 MJ: All right. So the Court will go ahead and sign that; and
16 that will apply to future postings.

17 [The Military Judge signed AE XXXIX.]

18 MJ: Let me see the letter.

19 [The court reporter handed AE LVI to the Military Judge.]

20 MJ: All right. The Court has marked as an exhibit; Appellate
21 Exhibit LXVI. Last night, Mr. Coombs forwarded me a letter from
22 the Center for Constitutional Rights; and I received an earlier
23 such letter on the 21st of March 2012.

24

1 MJ: Those are both marked as Appellate Exhibit LXVI,
2 requesting access to documents in this case. The Court finds as
3 follows:

4 The letter that I received last night requested that an
5 attorney will attend the hearing on April 24th and that the Center
6 for Constitutional Rights requests that he be afforded an
7 opportunity to address the Court directly and present arguments
8 concerning the request for public access to documents and
9 information filed in the case. It's basically a request for
10 intervention.

11 That request is denied.

12 The Court notes as follows:

13 The Court has received several requests for copies of
14 exhibits from this case from entities who are not parties to the
15 trial. Now, this Court's duty is to ensure that the 1st Amendment
16 Right to a public trial; and the accused's 6th Amendment Right to a
17 public trial are guaranteed. That Rule is also codified in Rule
18 for Courts-Martial 806. These proceedings have been open and will
19 remain open to the maximum extent. There may potentially be some
20 closed proceedings for classified information, if justified by the
21 government and findings of the Court.

22

23

24

1 MJ: The standard for closure of trials in the military is
2 under Rule for Court-Martial 806(c), which says that courts-martial
3 shall be open to the public unless:

4 One, there is a substantial probability that an
5 overriding interest would be prejudiced if the proceedings remained
6 open;

7 Two, closure is no broader than necessary to protect the
8 overriding interest;

9 Three, reasonable alternatives to closures were
10 considered and found inadequate; and

11 Four, the Military Judge makes case specific findings on
12 the record justifying closure. As I said earlier, these
13 proceedings have remained open thus far.

14 The Court has received several requests for copies of the
15 exhibits in this case from entities who are not parties to the
16 trial. While the Court acknowledges the existence of a common law
17 right of access to public records, including judicial documents,
18 that right is not absolute; Nixon versus Warner Communications
19 Inc., 435 U.S. 589 at 599, (1978).

20 The Court also notes the existence of a Congressionally
21 devised system of access to government documents, the Freedom of
22 Information Act or FOIA.

1 MJ: When Congress has created an administrative procedure for
2 processing and releasing to the public on terms meeting with
3 Congressional approval the common-law right of access may be
4 satisfied under the terms of that Congressionally devised system of
5 access. *Id.* at 603 to 606. Nor does the 1st Amendment guarantee
6 of freedom of the press or the 6th Amendment guarantee of a public
7 trial mandate access to or copying by non-parties of exhibits
8 admitted during a court-martial. Constitutional interpretation
9 aside, the Court notes that under the military justice system, the
10 Court does not call a court-martial into existence, nor is the
11 Court the custodian of exhibits in the case; whether appellate,
12 prosecution, or defense exhibits, which become part of a record of
13 trial. See for example, Rules for Courts-Martial 503(a) and (c);
14 601(a); 808 and 1103(b)(1)(a) and (d)(5).

15 Neither is the Court the release authority for such
16 documents if requested under FOIA. Requests for access to exhibits
17 in this case should be directed to the appropriate records
18 custodian.

19 [END OF PAGE.]

1 MJ: All right then, just for the record, the defense, after a
2 hearing last time, requested access for classified information in
3 Rhode Island, is that correct?

4 CDC[MR. COOMBS]: That is correct, Your Honor.

5 MJ: All right, do you want to describe for the record what has
6 transpired so far?

7 CDC[MR. COOMBS]: Yes, Your Honor. The defense requested,
8 because my practice is within Rhode Island, that we be given access
9 to an area where I can easily obtain classified information and
10 review it. The government has provided access at the Naval War
11 College at Newport, Rhode Island. The defense has gone to that
12 facility. The facility is adequate for the purposes of what I need
13 to do in order to prepare for this trial. So, the defense is
14 satisfied with regards to the access provided by the government. The
15 defense has asked that the government provide hard copies of charged
16 documents in this case dealing with the 793 offenses. The government
17 has indicated that they won't do that. However, they do not have an
18 objection to my paralegal, with the proper courier card, bringing
19 those documents from here to the Naval War College. Based upon that,
20 the defense has no issues with the access being provided to me at the
21 Naval War College.

22 MJ: All right, does the government have anything to add?

1 TC[MAJ FEIN]: Your Honor, just to clarify, the defense has been
2 in possession of those charged documents since early November of
3 2011. The request came today to--or, excuse me, came last Friday to
4 provide hard copies. The defense already has the hard copies. The
5 issue is getting them in a secure manner from DC up to Rhode Island
6 and that process is being figured out right now, or will be after
7 this hearing.

8 MJ: And, just to note for the record, the parties had a variety
9 of e-mail problems along the way that have been addressed by
10 government authorities and hopefully fixed. We will see how that
11 goes. But, at this point, the court is satisfied that each party has
12 received the e-mails and the filings with all of the other parties
13 and the court.

14 Do both sides agree?

15 CDC[MR. COOMBS]: Yes, Your Honor.

16 TC[MAJ FEIN]: Yes, Your Honor.

17 MJ: May I see the motion--or, the ruling for the motion to
18 compel discovery?

19 [The court reporter handed Appellate Exhibit 36 to the Military
20 Judge.]

21 MJ: All right, at the last motion session, the defense had
22 moved to compel discovery of a variety of information. That issue

1 was litigated at that session. The court took it under advisement
2 and issued a ruling on the 23rd of March 2012.

3 There are a number of motions today to--sort of stemming
4 off of this, I will say, that we will be addressing after I announce
5 the ruling of the court in open court.

6 The ruling on defense motion to compel discovery:

7 "Factual Findings: in its motion of 14 February 2012, the
8 defense moved the court to compel the following discovery from the
9 government in accordance with Rule For Courts-Martial 701(a)(2),
10 documents, tangible objects and reports within the possession,
11 custody or control of military authorities that is material to the
12 preparation of the defense; 701(a)(5), information to be offered by
13 the government at sentencing; 701(a)(6), evidence favorable to the
14 defense; and, R.C.M. 906(b)(7), motion for appropriate relief
15 regarding discovery and production of evidence.

16 The government response is listed below each item.

17 The first item:

18 "FOIA requests regarding video in Specification 2 of Charge
19 II, a copy of any Freedom of Information Act request and any response
20 or internal discussions of any such FOIA request if it is related to
21 the video that is the subject of Specification 2 of Charge II.

22 The government response was that on 3 October 2011 the
23 defense [sic] produced all enclosures to any Freedom of Information

1 Act, FOIA response, specifically, Bates numbers 000-00772 through
2 000-00851. On the 15th March 2012, the government advised the court
3 it had given the defense the information it requested.

4 b) Quantico Video. A video of PFC Manning being ordered to
5 surrender his clothing at the direction of CW4 James Averhart and his
6 subsequent interrogation by CW4 Averhart on 18 January 2011. The
7 defense filed a preservation evidence request over one year ago on 19
8 January 2011 for this information. The defense alleges the
9 government produced the video of PFC Manning being ordered to
10 surrender his clothing but not the video of the subsequent
11 interrogation by CW4 Averhart. The defense alerted the government of
12 the need to locate the additional video in a telephone conversation
13 on 12 December 2011. The defense proffered that the requested video
14 is relevant to support the accused's claim of unlawful pretrial
15 punishment. The defense presented no evidence that the video exists.

16 The government response: upon defense request, the United
17 States promptly preserved all Quantico videos requested by the
18 defense. On 6 December 2011, the government produced all of the
19 videos of the alleged Quantico incident. The alleged video requested
20 by the defense does not exist.

21 In an e-mail to the court dated 20 March 2012, the defense
22 accepted trial counsel's representations that the government has

1 provided the defense all of the videos provided to the government by
2 Quantico.

3 (c) EnCase Forensic Images. An EnCase forensic image of
4 each computer from the Tactical Sensitive Compartmented Information
5 Facility, T-SCIF, and the Tactical Operations Center, TOC, of
6 Headquarters and Headquarters Company, 2nd Brigade Combat Team, 10th
7 Mountain Division, Forward Operating Base, FOB, Hammer, Iraq. On 30
8 September 2010, CID requested preservation of the hard drives used
9 during the 2nd BCT deployment to Iraq. The defense submitted a
10 preservation request for this evidence on 21 September 2011.

11 The government response: on 21 September 2011, more than a
12 year after the accused's unit redeployed back to Fort Drum, New York,
13 the defense requested that the United States preserve these hard
14 drives. The government identified four commands or agencies that may
15 possess hard drives responsive to the request and submitted a request
16 to locate and preserve evidence to each command or agency. Those
17 entities include:

- 18 1) 2nd Brigade Combat Team, 10th Mountain Division;
- 19 2) The Federal Bureau of Investigation;
- 20 3) 3rd Army, United States Army Central; and,
- 21 4) The computer crime investigative unit, US Army Criminal
22 Investigation Division.

1 The government request to 2/10 Mountain yielded the
2 preservation of 181 hard drives of which the United States has
3 identified 13 as being located in the SCIF during the unit's
4 deployment to FOB Hammer. None of these 13 hard drives contained the
5 "Bradley.Manning" user profile. At the 39(a) session on 15 March
6 2012, the government advised there were 14 hard drives responsive to
7 the defense discovery request. The government argues the hard drives
8 are not relevant and necessary for the defense under Rule for Courts-
9 Martial 703(f) and, because they are classified, the rules of
10 production under M.R.E 505 should govern whether the images are
11 discoverable.

12 D. Damage assessments and closely aligned investigations.
13 The following damage assessments and records from closely aligned
14 investigations:

15 1) the Central Intelligence Agency, any report compiled by
16 the WikiLeaks Task Force and any report generated by the WikiLeaks
17 Task Force under the direction of former director, Leon Panetta;

18 2) the Department of Defense, the damage assessment
19 completed by the Information Review Task Force, IRTF, and any report
20 generated by the IRTF under the guidance and direction of former
21 Secretary of Defense, Robert Gates. Additionally, the defense
22 requests all forensic results and investigative reports by any of the

cooperating agencies in this investigation, DoS, FBI, DIA, Office Of Counter National Intelligence [sic] Executive, ONCIX, and the CIA;

3) Department of Justice. Any documentation related to the DOJ investigation of the disclosures by WikiLeaks concerning PFC Bradley Manning including any grand jury testimony or information relating to 18 U.S.C. 2703(b). Order or any search warrant by the government of Twitter, Facebook, Google, or any other social media site;

4) Department of State. The damage assessment completed by the Department of State, any report generated by the task force assigned to review each released diplomatic cable and any report or assessment by the Department of State concerning the released diplomatic cables.

The government response: the government intends to disclose all relevant and necessary classified and unclassified grand jury testimony that the government is authorized under the federal rules to the defense. The government:

1) Confirms the existence of completed WTF and IRTF damage assessments;

2) Confirms the existence of a damage assessment by DoS that is not yet complete; and,

3) Denies that ONCIX has produced an interim or final damage assessment.

At the Article 39(a) session on 15 March 2012, the Government stated it had no authority to disclose or discuss the requested damage assessments. The government argues the defense has not demonstrated that the damage assessments are relevant and necessary to an element of an offense or legally cognizable defense or otherwise inadmissible in evidence under Rule for Courts-Martial 703(f) because the defense is confusing prospective OCA classification determinations assessing whether damage could occur relevant to the elements of the charged offenses with hindsight damage assessments determining what damage did occur, not relevant to the elements of charged offenses. The government further responded that it is unaware of any forensic results or investigative reports from within the DoS, FBI, DIA, ONCIX, or the CIA that contributed to any law enforcement investigation;

2. That the accused is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting government property and two specifications of knowingly exceeding authorized access to a government computer in violation of Articles 92, 104 and 134, UCMJ and 10 United States Code 892, 904 and 934, 2010;

1 3. The defense motion to compel the EncCse forensic
2 images, the damage assessments from WTF, IRTF and DoS and the
3 forensic reports from DoS, FBI, DIA, ONCIX or the CIA remain at
4 issue;

5 4. The defense submitted the following proffers of
6 relevance and evidence in support of its motion to compel: EnCase
7 forensic images. The defense requested an EnCase forensic image for
8 each computer from the T-SCIF and TOC of Headquarters and
9 Headquarters Company, 2nd Brigade Combat Team, 10th Mountain
10 Division, Forward Operating Base Hammer, Iraq.

11 A) proffer of relevance: the defense proffers the EnCase
12 image would allow its forensic expert to inspect the 14 seized
13 government computers from the T-SCIF and the TOC. Such inspection
14 would allow the defense to discover whether it was common for
15 Soldiers to add technically unauthorized computer programs to their
16 computers and that the practice of the unit was to tacitly authorize
17 the addition of unauthorized programs including, but not limited to,
18 mIRC, a full-featured Internet relay chat client for Windows that can
19 be used to communicate, share, play or work with others on IRC
20 networks, Wget a web crawler program designed for robustness over
21 slow or unstable network connections, Geo trans, an application
22 program which allows the user to easily convert geographic
23 coordinates among a wide variety of coordinate systems, map

1 projections and datums, and Grid Extractor, a binary executable
2 capable of extracting MGRS grids from multiple free-text documents
3 and importing them into a Microsoft Excel spreadsheet to their
4 computers. The defense argues this information is relevant because
5 the government has charged PFC Manning with adding unauthorized
6 software to his computer--to his government computer in
7 Specifications 2 and 3 of Charge III. The information is relevant to
8 establish the defense theory that the addition of the software not on
9 the approved list of authorized software was authorized by the
10 accused's chain of command through the practice of condoning and
11 implicitly or explicitly approving the additions of such software.

12 B) Evidence: The defense has provided the court with a
13 summary of what the defense asserts the following witnesses deployed
14 with the accused testified to at the Article 32 investigation. And I
15 will note that that evidence was provided after the last session.

16 Captain Steve Lim: Soldiers listened to music and watched
17 movies on their computers and saved music, movies and games,
18 unauthorized software.

19 Captain Casey Fulton: Soldiers saved music, games and
20 computers to their computers. She added mIRC Chat and Google Earth
21 to her computer.

22 Mr. Jason Milliman: Soldiers added unauthorized games and
23 music to their computers and was aware that Soldiers were adding

1 unauthorized software to their computers although he did not believe
2 the practice is common.

3 Captain Thomas Cherepko: he saw unauthorized music,
4 movies, games and unauthorized programs improperly stored on the T-
5 drive. He advised his immediate supervisor and the Brigade Executive
6 Officer concerning the presence of unauthorized media on the T-drive,
7 nothing was done.

8 Ms. Jihreah Showman: She and everyone else in the unit
9 viewed mIRC chat as mission essential and everyone put it on their
10 computers.

11 Damage assessments and closely aligned investigations. The
12 defense requested the following damage assessments and records from
13 closely aligned investigations. The court has already noted those--
14 what those were.

15 The proffer of relevance for all damage reports: The
16 defense argues that the evidence of damage assessments, whether
17 favorable or not, are material to the preparation of the defense for
18 the merits and sentencing in accordance with Rule for Courts-Martial
19 701(a)(2) and if the damage assessments are favorable, they are also
20 relevant, helpful to the defense and discoverable under Military Rule
21 of Evidence 701(a)(6) and *Brady v. Maryland* 373 US 83 1963. Even if
22 the extent of actual damage caused by the alleged leaks is not

1 relevant to the merits, it is relevant discovery for the defense to
2 prepare its presentencing case.

3 Evidence: The defense provided its 30 November 2011
4 request to the Article 32 investigating officer for the production of
5 evidence to include the damage assessments. That request included
6 the following:

7 A. 5 August 2010, creating--memorandum creating the IRTF
8 and 16 August 2010 letter from former Defense Secretary Robert Gates
9 to Senator Carl Levin discussing the IRTF.

10 B. 8 December 2010, message from former CIA director Leon
11 Panetta to the CIA employees advising them that the office of
12 security is directed to investigate the damage from WikiLeaks. 22
13 December 2010, Washington Post article asking that the CIA establish
14 the WTF to assess the impact of exposure of thousands of leaked
15 diplomatic cables.

16 C. 18 January 2011, Reuters Article suggesting, "Internal
17 US government reviews have determined that a mass leak of diplomatic
18 cables caused only limited damage to US interests abroad despite the
19 Obama administration's public statements to the contrary". The
20 article listed the sources as two congressional aides familiar with
21 the briefings by State Department officials and Congress. The
22 article further went on further to state, "national security
23 officials familiar with the damage assessments being conducted by

1 defense and intelligence agencies told Reuters the reviews so far
2 have shown pockets of short-term damage, some of it potentially
3 harmful. Long-term damage to US intelligence and Defense operations,
4 however, is unlikely to be serious", they said. And, "But current
5 and former intelligence officials note that while WikiLeaks has
6 released a handful of inconsequential CIA analytical reports, the
7 website has made public few, if any, real intelligence secrets
8 including reports from undercover agents or ultrasensitive technical
9 intelligence reports, such as spy satellite pictures or communication
10 intercepts." All forensic results and investigative reports by any
11 of the cooperating agencies in this investigation, DoS, FBI, DIA, the
12 Office of the National Counterintelligence Executive and the CIA.

13 Proffer of Relevance: none.

14 Evidence: none.

15 5. The defense filed a discovery request for the EnCase
16 images, damage assessments, and forensic results and investigative
17 reports by any of the cooperating agencies in the investigation. On
18 13 October 2011, the defense made a specific request for *Brady*
19 material, identifying the damage assessments. On 30 November 2011,
20 the government responded to requests for damage assessment under
21 *Brady* that the government had no knowledge of any *Brady* material in
22 the presence of the CIA, Department of Defense, Department of Justice
23 or Department of State and it would furnish such records if it became

1 aware of them. And, the government did not have authority to
2 disclose the damage assessments. At or near 15 December 2011, the
3 government advised the Article 32 investigating officer that the
4 damage assessments were classified, that the government did not have
5 authority to discuss the substance of the damage reports and that all
6 but the IRTF are not under the control of military authorities. On
7 31 January 2012, the government responded to the defense discovery
8 request for damage assessments stating it would not provide the
9 damage requests--damage assessment requests because the defense
10 failed to provide an adequate basis for its request and the defense
11 was invited to renew its request with more specificity and an
12 adequate basis for the request.

13 6. On 21 March 2012, the Court required the government to
14 respond to the following factual questions regarding each of the
15 requested damage assessments.

16 The government response follows the question.

17 Questions: 1. Is each in the possession, custody and
18 control of military authorities?

19 Government response:

20 A. Defense Intelligence Agency and Information Review Task
21 Force: Yes. The classified document itself is in the possession of
22 military authorities, the DIA. However, the document contains
23 material from other agencies and departments outside the control of

1 military authorities. The military controls the document itself but
2 not all of the information within its four corners.

3 B. WikiLeaks Task Force: No.

4 C. Department of State: Department of State has not
5 completed a damage assessment.

6 D. Office of National Counterintelligence Executive:
7 ONCIX has not produced any interim or final damage assessment in this
8 matter.

9 Question 2. If no, what agency has control of each of the
10 damage assessments?

11 Government response:

12 WTF: the Central Intelligence Agency has possession,
13 custody and control.

14 Question 3. Does the prosecution have access to the damage
15 assessments?

16 Government response:

17 A. DIA and IRTF: The prosecution was given limited access
18 for the purposes of reviewing for any discoverable material. The
19 prosecution only has control of the information within the document
20 that is owned by the Department of Defense military authority.

21 B. WTF: The prosecution was given very limited access for
22 the purpose of reviewing for preparation of the previous motions

1 hearing. The prosecution will have future access to complete a full
2 review for *Brady* material as outlined below.

3 [Question] 4. Has the prosecution examined each of the
4 damage assessments for *Brady* material?

5 Government response: DIA and IRTF, yes; WTF, no.

6 [Question] 4a. If yes, is there any favorable material?

7 Government response: DIA and IRTF, yes, however, the United
8 States has found--only found classified information that is favorable
9 to the accused that is material to punishment. *Cone v. Bell*, 129
10 Supreme Court 1769 1772, 2009, see also *Brady v. Maryland*. The
11 United States has not found any material--any favorable material
12 relevant to findings.

13 Question 4b. If no, why not?

14 Government response: WTF, the prosecution has conducted a
15 cursory review of the damage assessment in order to understand what
16 information exists within the agency and has not conducted a detailed
17 review for *Brady* material. The process is ongoing and the
18 prosecution will produce all, "evidence favorable to the accused that
19 is material to guilt or punishment if it exists under the procedures
20 outlined in Military Rule of Evidence 505, *Cone vs. Bell* 129 Supreme
21 Court at 1772 and also *Brady vs. Maryland* 373 US 87. Additionally,
22 the United States is concurrently working with other federal
23 organizations which we believe to have a good-faith basis to believe

1 they possess damage assessments or impact statements and will make
2 such discoverable information available to the defense under military
3 Rule of Evidence 505."

4 7. No head of agency or military department or government
5 agency concerned has claimed a privilege to withhold classified
6 information in accordance with Military Rule of Evidence 505(c).

7 The Law.

8 1. Defense discovery in the military justice system is
9 governed by the constitutional standard set forth by the Supreme
10 Court in *Brady vs. Maryland* and recently reaffirmed in *Smith vs.*
11 *Cain*; Article 46, UCMJ, opportunity to obtain witnesses and other
12 evidence; Rule for Courts-Martial 701, discovery; and also by Rule
13 for Courts-Martial 703, production of evidence when the requested
14 defense discovery is evidence not under the control of military
15 authorities. For classified information, where the government
16 voluntarily agrees to disclose classified information in whole or in
17 limited part to the accused, the provisions of M.R.E. 505(g) apply.
18 When the government seeks to use M.R.E. 505 to withhold classified
19 information, a privilege must be claimed in accordance with M.R.E.
20 505(c), *United States vs. Schmidt* 60 MJ 1 Court of Appeals for the
21 Armed Forces, 2004.

22 2. *Brady* requires the government to disclose evidence that
23 is favorable to the defense and material to guilt or punishment.

1 Favorable evidence is exculpatory and impeachment evidence. *Brady*
2 applies to classified information. The Government must either
3 disclose evidence that is favorable to the defense and material to
4 guilt or punishment, seek limited disclosure in accordance with
5 Military Rule of Evidence 505(g)(2), or invoke the privilege for
6 classified information under Military Rule of Evidence 505(c) and
7 follow the procedures under Military Rule of Evidence 505(f) and (i).
8 The classified information privilege under Military Rule of Evidence
9 505 does not negate the government's duty to disclose information
10 favorable to the defense and material to guilt or punishment under
11 *Brady*. The government may provide information to the court and move
12 for limited disclosure in accordance with Military Rule of Evidence
13 505(g)(2). If a privilege is claimed, Military Rule of Evidence
14 505(i) allows the government to propose alternatives to full
15 disclosure.

16 3. Trial counsel have the due diligence duty to review the
17 files--well first of all, footnote: the parties have not presented
18 the court with any military case directly on point, *Cone vs. Bell*
19 does not address classified information disclosures required by the
20 government under *Brady*. Federal courts are using the Classified
21 Information Procedures Act, CIPA. I recognize that *Brady* requires
22 disclosure of evidence by the prosecution when it is both favorable

1 to the accused and material to punishment or guilt, see *United States*
2 *vs. Hanna*, 661 F.3d 271, 6th Circuit, 2011.

3 3. Trial counsel have the due diligence duty to review the
4 files of others acting on the government's behalf in the case for
5 favorable material evidence--evidence material to guilt or
6 punishment. The scope of *Brady* due diligence to examine files beyond
7 the trial counsel files is limited to: one, files of law enforcement
8 authorities that have participated in the investigation of the
9 matter--the subject matter of the charged offense; two, investigative
10 files in a related case maintained by an entity closely aligned to
11 the prosecution; and three, other files as designated in the defense
12 discovery request that involve a specified type of information within
13 a particular entity. For relevant files known to be under the
14 control of another government entity, trial counsel must make that
15 fact known to the defense and engage in good-faith efforts to obtain
16 the material, *United States vs. Williams* 50 MJ 436 Court of Appeals
17 for the Armed Forces, 1999.

18 4. Article 46, UCMJ, opportunity to obtain witnesses and
19 other evidence provides, in relevant part, the trial counsel, defense
20 counsel and the court-martial shall have equal opportunity to obtain
21 witnesses and other evidence in accordance with such regulations as
22 the president may prescribe.

1 5. The President promulgated Rules for Courts-Martial 701
2 to govern discovery and 703 to govern evidence production. The rules
3 work together when discovery of evidence not in the control of
4 military authorities is relevant and necessary for discovery, *United*
5 *States vs. Graner* 69 MJ 104 Court of Appeals for the Armed Forces,
6 2010. The requirements for discovery and production of evidence are
7 the same for classified and unclassified information under Rules For
8 Courts-Martial 701 and 703 unless the government moves for limited
9 disclosure under M.R.E. 505(g)(2) or claims M.R.E. 505 privilege for
10 classified information. The government voluntarily--if the
11 government voluntarily discloses classified information to the
12 defense, the protective order and limited disclosure provisions of
13 R.C.M. 505--excuse me, and M.R.E. 505(g) apply. If after referral,
14 the government invokes the classified information privilege, the
15 procedures of M.R.E. 505(f) and (i) apply.

16 6. Relevant discovery rules in R.C.M. 701 discovery are:

17 A. R.C.M. 701(a)(2), documents, tangible objects and
18 reports, governs defense requested discovery of evidence material to
19 the preparation of the defense that is within the possession, custody
20 or control of military authorities and whose existence is known or by
21 due diligence should be known by the trial counsel. The Rule
22 provides for such discovery after service of charges on the accused.

1 B. R.C.M. 701(a)(6), evidence favorable to the defense,
2 codifies *Brady* and provides that the trial counsel shall as soon as
3 practicable, disclose to the defense the existence of evidence known
4 to the trial counsel, which reasonably tends to: A. negate the guilt
5 of the accused to an offense charged; B. Reduce the degree of guilt
6 of the accused to an offense charged; or, C. Reduce the punishment.

7 C. R.C.M. 701(f) provides that nothing--excuse me, R.C.M.
8 701(f) provides that nothing in R.C.M. 701 shall be construed to
9 require the disclosure of information protected from disclosure by
10 the Military Rules of Evidence. R.C.M. 701(f) applies to discovery
11 of classified information when the government moves for limited
12 disclosure under M.R.E. 505(g)(2) of classified information for
13 discovery IAW R.C.M. 701 or when the government claims a privilege
14 under Military Rule of Evidence 505(c) for classified information.

15 D. R.C.M. 701(g) authorizes the military judge to regulate
16 discovery. A military judge is not detailed to a court-martial until
17 the charges are referred for trial. Article 26(a), UCMJ.

18 7. R.C.M. 703, production of witnesses and evidence,
19 states in relevant part:

20 A. R.C.M. 703(f)(1) provides that each party is entitled
21 to the production of evidence which is relevant and necessary.

22 B. R.C.M. 703(f)(4) provides that the evidence under the
23 control of government may be obtained by notifying the custodian of

1 the record of the time, place and date the evidence is required and
2 to request the custodian to send or deliver the evidence. The
3 custodian of the evidence may request relief on the grounds the order
4 of production is unreasonable or oppressive. After referral, the
5 military judge may direct that the subpoena or order for production
6 be withdrawn or modified. Subject to Military Rule of Evidence 505,
7 classified information--classified evidence, the military judge may
8 direct that the evidence be submitted for an *in camera* inspection in
9 order to determine whether relief should be granted.

10 8. Both the discovery rules under military--under R.C.M.
11 701 and the evidence production rules under R.C.M. 703 are grounded
12 in relevance. In order to have the Military Judge compel the release
13 of evidence, either as discovery under R.C.M. 701 or evidence
14 production under R.C.M. 703, the defense must establish that the
15 evidence is relevant, either to the merits or sentencing, *United*
16 *States vs. Graner* 69 MJ 104, Court of Appeals for the Armed Forces,
17 2010.

18 9. Prior to referral, the government may decline to
19 disclose information requested by the defense in accordance with
20 R.C.M. 701 where the government contests relevance and materiality.
21 After referral, R.C.M. 701(g) empowers the military judge to deny or
22 regulate discovery to include requiring the government to produce the
23 requested discovery for *in camera* review. R.C.M. 701(g) does not

1 require the government to produce all discovery requested by the
2 defense to the court for *in camera* review. As stated in this case,
3 where the government withholds discovery, the defense may move for a
4 motion for appropriate relief to compel discovery in accordance with
5 R.C.M. 906(b)(7) and where classified information is withheld by the
6 government, in accordance with M.R.E. 505(d). Upon such motion, and
7 a sufficient showing by the defense of relevance and materiality, the
8 court may require the evidence to be produced for *in camera* review.

9 10. If classified discovery is at issue and the government
10 agrees to disclose classified information to the defense, the
11 military judge shall enter an appropriate protective order if the
12 government requests one in accordance with Military Rule of Evidence
13 505(g)(1) or allow the government to move for limited disclosure
14 under a M.R.E. 505(g)(2).

15 11. Classified information--if classified discovery
16 detrimental to national security is at issue, and the government does
17 not wish to discuss--disclose the classified information in part or
18 in whole to the defense, the government must claim a privilege under
19 Military Rule of Evidence 505(c). There is no privilege under
20 Military Rule of Evidence 505 for classified information unless the
21 privilege is claimed by the head of the executive or military
22 department and the government agency concerned based on a finding

1 that the information is properly classified and that disclosure would
2 be detrimental to the national security.

3 12. M.R.E. 505(e), pretrial sessions, states, in relevant
4 part, that after referral and prior to arraignment any party may move
5 for a session under Article 39(a) to consider matters relating to
6 classified information in connection with the trial. Following such
7 a motion or *sua sponte*, the military judge, promptly, shall hold a
8 session to establish the timing of the request for discovery, the
9 provision of notice under Military Rule of Evidence 505(h) and the
10 initiation of procedures under Military Rule of Evidence 505(i). In
11 addition, the military judge may consider any matters that relate to
12 classified information or may promote a fair and expeditious trial.

13 Analysis.

14 1. No government entity in possession of any discovery at
15 issue has claimed a privilege under M.R.E. 505(c). Thus, *Brady*,
16 M.R.E. 701(a)(2), 701(a)(6), and 701(g) govern discovery of both
17 classified and unclassified information. M.R.E. 505(g) also applies
18 when the government voluntarily discloses classified information.
19 R.C.M. 703(f) requires that discovery of evidence outside the control
20 of military authorities be relevant and necessary.

21 2. The 14 hard drives from which the EnCase images are
22 requested are within the possession, custody or control of military
23 authorities. Some of the information in the IRTF damage assessment

1 is under the possession, custody or control of military authorities.
2 The Department of State and WTF assessments are in the possession,
3 custody and control of the Department of State and the Central
4 Intelligence Agency, respectively.

5 3. Because no privilege has been invoked under M.R.E.
6 505(c) and the government has not moved for limited disclosure under
7 M.R.E. 505(g)(2), R.C.M. 701(f) does not preclude disclosure of
8 classified information that is material to the preparation of the
9 defense under R.C.M. 701(a)(2) where classified information is
10 favorable to the defense under R.C.M. 701(a)(6)

11 4. Under *Brady*, and R.C.M. 701(a)(6), the government has a
12 due diligence duty to search for evidence that is favorable to the
13 defense and material to the guilt or punishment. This includes the
14 due diligence duty to search any damage assessments pertaining to the
15 alleged leaks in this case made by CIA, DoD, DoJ and DoS. These
16 agencies are closely aligned with the prosecution in this case. The
17 government must disclose any favorable classified information from
18 the damage assessments that is material to punishment, move for
19 limited disclosure under M.R.E. 505(d)(2) or claim the privilege in
20 accordance with M.R.E. 505(c).

21 5. The government has examined the IRTF damage assessment
22 and has found information favorable to the accused and material to
23 punishment. The Court further finds that the IRTF damage assessment

1 is relevant and necessary for discovery under *Brady* and R.C.M.
2 701(a) (6) .

3 6. The Court finds that the WTF and DoS damage assessments
4 may contain evidence favorable to the accused that is material to
5 punishment. The Court finds that these damage assessments are
6 relevant and necessary for the accused to examine for *Brady* material.

7 7. The Court finds that all three damage assessments--
8 finds all three damage assessments relevant and necessary for the
9 court to conduct an *in camera* review to determine whether they
10 contain information that is favorable to the accused and material to
11 punishment under *Brady*, whether they contain evidence relevant--or
12 information relevant and favorable to the accused under R.C.M.
13 701(a) (6) and whether they contain information material to the
14 preparation of the defense under R.C.M. 701(a) (2)

15 8. The government has advised the Court that it is
16 "unaware" of any forensic results or investigative files relevant to
17 this case maintained by Department of State, FBI, DIA, ONCIX, and
18 CIA. These agencies are closely aligned to the government in this
19 case. The government has a due diligence duty to determine whether
20 such forensic results or investigative files that are germane to this
21 case are maintained by these agencies. The government will advise
22 the court whether they have contacted the DoS, FBI, DIA, ONCIX, and

CIA and that each of these agencies have stated to the government that no such forensic results or investigative files exist.

9. The Court finds that a complete search of the relevant 14 hard drives of computers from the Tactical Sensitive Compartmented Information Facility, T-SCIF, and the Tactical Operations Center, TOC, of HHC, 2nd Brigade Combat Team, 10th Mountain Division, Forward Operating Base Hammer, is not material to the preparation of the defense for Specifications 2 and 3 of Charge III, in accordance with R.C.M. 701(a)(2). At least some of the information on the hard drives is classified. The witnesses at the Article 32 investigation testified that the Soldiers would save unauthorized music, games, movies and other programs such as Google Earth and mIRC Chat. The defense has evidence from the Article 32, witnesses to further the defense theory. Although a complete search is not material, the court will direct the government to search each of the 14 hard drives for Wget, mIRC Chat, Google Earth, movies, games, music and any other specifically requested programs for the defense. The government will disclose the results of the search to the defense under M.R.E. 701(g)(1) and M.R.E. 505(g)(2). The defense may renew its motion to compel EnCase forensic images after receipt of the government's-- results of the government's search.

Ruling.

The defense motion to compel discovery is granted in part.

1 Order.

2 1. The government will immediately begin the process of
3 producing the damage assessments that are outside the possession,
4 custody and control of military authorities in accordance with Rule
5 for Courts-Martial 703(f)(4)(a).

6 If necessary, the government shall prepare an order
7 for the court to sign for each custodian;

8 2. The government will immediately cause an inspection of
9 the 14 hard drives as provided in paragraph "analysis 9" above. On
10 or before 30 March 2012, the defense will provide a list of
11 additional terms the defense wants the government to add it to its
12 search of the 14 hard drives. On or before 20 April 2012, the
13 government will provide the results of the search;

14 3. The government shall contact DoS, FBI, DIA, ONCIX, and
15 CIA to determine whether these agencies contain any forensic results
16 or investigative files relevant to this case. The government will
17 notify the Court no later than 20 April 2012 whether any such files
18 exist. If they do exist, the government will examine them for
19 evidence that is favorable to the accused and material to either
20 guilt or punishment;

21 4. By 20 April 2012, the government will notify the Court
22 with a status of whether it anticipates any government entity that is
23 the custodian of classified evidence that is the subject of the

1 defense's motion to compel will seek limited disclosure in accordance
2 with M.R.E. 505(g)(2) or claim a privilege under M.R.E. 505(c) for
3 the classified information under that agency's control;

4 5. The government will disclose any classified information
5 from the three damage assessments that is favorable to the accused
6 and material to guilt or punishment and provide any additional
7 unclassified information from the damage assessments to the court for
8 *in camera* review in accordance with R.C.M. 701(g)(2); and

9 6. By 18 May 2012, the government will identify what
10 classified information from the three damage reports, if found, that
11 is favorable to the accused and material to guilt or punishment. By
12 18 May 2012, the government will disclose all classified information
13 from the three damage assessments to the court for *in camera* review
14 in accordance with R.C.M. 701(g)(2) or, at the request of the
15 government, for *in camera* review for limited disclosure under M.R.E.
16 505(g)(2). By 18 May 2012, if the relevant government agency claims
17 a privilege under M.R.E. 505(c) and the government seeks an *in camera*
18 proceeding under M.R.E. 505(i), the government will move for an *in*
19 *camera* proceeding in accordance with M.R.E. 505(i)(2) and (3) and
20 provide notice to the defense under Military Rule of Evidence
21 505(4)(A) [sic].

22 So ordered this 23rd day of March, 2012.

1 Now in the interim, the government has requested a delay
2 until 2 May for the CIA, is that correct?

3 TC[MAJ FEIN]: Yes, Your Honor.

4 MJ: Okay, and the Court granted--the defense did not object and
5 the court granted that delay and that has been marked as Appellate
6 Exhibit--the ruling for relief to respond until 2 May is Appellate
7 Exhibit 38. But, then the government request for leave to respond
8 until 2 May is Appellate Exhibit 37.

9 Now, let's go through the order and to see where we are
10 here.

11 TC[MAJ FEIN]: Your Honor?

12 MJ: Yes?

13 TC[MAJ FEIN]: If we may, also on 26 March, the government sent
14 an e-mail to clarify one portion of the order. This was in reference
15 to the representations that the prosecution made about whether we
16 were or were not aware of investigative files maintained by the FBI
17 and the Department of State. If I may just read the e-mail?

18 MJ: Proceed.

19 TC[MAJ FEIN]: That portion: "Finally, to clarify any
20 misunderstanding resulting from paragraph 8 on page 11, Your Honor,
21 the prosecution is, was, aware of investigative files maintained by
22 the FBI and Department of State. Prior to referral, the prosecution
23 produced the Diplomatic Security Services, the investigative

1 organization for Department of State, documents. And, immediately
2 after the protective order was ordered, after the protective order
3 for classified information was ordered, the prosecution produced the
4 approved documents and the classified FBI file. There are additional
5 documents the prosecution is seeking approval to produce from the FBI
6 and we have been working to obtain these approvals since referral."

7 MJ: All right, why don't we begin--okay, so order number 1, the
8 government will immediately begin the process of producing the damage
9 assessments that are outside the possession, custody and control of
10 military authorities.

11 Has that been done?

12 TC[MAJ FEIN]: Yes, ma'am. Out of the three damage assessments
13 of the court's order, the prosecution has reached out to those
14 agencies to start processing them; however, the Department of State
15 has asked the prosecution to submit to the court a *ex parte* and *in*
16 *camera* filing that they will give to us in the next day or two that
17 explains why their damage assessment should not be subject to this
18 order and actually provides the draft. It should be the latest
19 version, but a draft version for the court to review to make that
20 determination.

21 MJ: Okay, and what is the authority that the government is
22 relying on for me to consider that *ex parte*?

1 TC[MAJ FEIN]: Your Honor, under 701(g)(2), to do an initial
2 review, even though it is classified and then based off of your
3 ruling then, we would likely move under 505(g)(2) if we identify
4 discoverable information under *Brady* or 701(a)(6).

5 MJ: All right, let's talk about the hard drives. The order
6 says the government will immediately cause an inspection of the 14
7 hard drives.

8 Now what has transpired with that?

9 TC[MAJ FEIN]: Your Honor, immediately after the Court's order,
10 the 14 hard drives were obtained, 13 from Fort Drum and one from
11 CID's evidence locker. The hard drives were analyzed and out of
12 those 14, five were operable and did not have completely wiped data
13 on those drives. Out of those five, one was partially wiped and four
14 had information. Those four were initially analyzed under the
15 court's order and those results have been given--provided to the
16 defense. Since then, the defense has requested forensic images of
17 those five drives and the government has--will comply with that and
18 is working that currently.

19 MJ: All right. And, the defense also gave the government a
20 list, is that correct, of programs that they wanted the government to
21 search for?

22 CDC[MR COOMBS]: That is correct, Your Honor.

1 MJ: Okay, so right now, the government then, it is going to
2 give the defense access to the drives, is that right?

3 TC[MAJ FEIN]: The government is working on that, Your Honor.
4 The next step that is currently happening is the images are being
5 prepared for security experts to review; they have to go through
6 because they are classified drives to determine what classified
7 information is on them. Once that is complete then that information
8 will be submitted to the different authorities to get approval to
9 turn it over. The government intends to meet the 18 May deadline and
10 will notify the court if there is any issue.

11 MJ: Are we going to have any security clearance issues with the
12 experts?

13 CDC[MR COOMBS]: No, Your Honor.

14 MJ: Depending on the level of classification?

15 TC[MAJ FEIN]: No, Your Honor. It does not appear----

16 CDC[MR COOMBS]: Everything should be Secret level on those
17 computers.

18 MJ: All right, so this issue then is basically resolved?

19 TC[MAJ FEIN]: Yes, Your Honor.

20 MJ: Or, in the process of being resolved.

21 CDC[MR COOMBS]: That is correct.

22 MJ: So, do we need to address anything further with respect to
23 the EnCase hard drives?

1 CDC[MR COOMBS]: No, Your Honor.

2 TC[MAJ FEIN]: No, Your Honor.

3 MJ: All right, let's look at number 4 then, by 20 April 2012,
4 the government will notify the Court with a status of whether it
5 anticipates any government entity that is the custodian of classified
6 evidence will compel limited disclosure under M.R.E. 505(g)(2) or
7 claim a privilege under M.R.E. 505(c).

8 Does--What is the government's notice with respect to that?

9 TC[MAJ FEIN]: May I have a moment, Your Honor?

10 MJ: Yes.

11 TC[MAJ FEIN]: Your Honor, on 20 April the prosecution submitted
12 to the court that there are four, ultimately four entities that have--
13 -or, the answer to the question on whether there is a forensic
14 results or investigative files, and, at the end of that list, the
15 United States anticipates only the FBI will have information that
16 will be submitted for further--excuse me, under the category of
17 forensic results or investigative files, under 505(g)(2).

18 MJ: All right. Now, this motion to compel discovery has
19 generated some additional issues.

20 Defense, what remains on the table?

21 CDC[MR COOMBS]: Your Honor, it will probably go--we will
22 address some of this with a motion to compel the grand jury. But,
23 the defense's position is that the government has taken a very, very

1 narrow interpretation of the word, "investigation". They believe
2 that any damage assessment by ONCIX or by DIA or ODNI or any other
3 agency does not fall under investigative aspect. So, where they
4 responded, "No", to the Court's request whether or not ONCIX or DIA
5 had any forensic or investigative files, it was based upon their
6 interpretation that a damage assessment, where the agency has
7 actually gone out and asked all of the other agencies to take a look
8 at the charged documents in this case and determine whether or not
9 there is in fact any harm and if there is harm, what that harm is,
10 and what mitigation steps the agency has taken to address that harm.
11 The government seems to believe that that would not be something to
12 be responsive or needed to be provided in response to the defense's
13 request for any file related to this case, any forensic or
14 investigative report. Based upon the government's position and our
15 likely argument with regards to what is in the possession, custody,
16 control of the United States government, in this case the military,
17 the defense will likely have to do a new motion to compel both these
18 damage assessments under the government's much more restrictive view
19 of what is an investigation for both the ONDI [sic], for ONCIX, for
20 DIA, and the defense will go through and identify all the other
21 agencies that we have requested information and the government has
22 not provided. And, it appears that the reason why it has not
23 provided this is because of its interpretation of the word,

1 "investigation". That will probably be a subject of a motion to
2 compel, and we would request the court compel these items to the
3 defense or at the very least view them *in camera*.

4 MJ: All right, so this is going to be a motion that was not
5 anticipated for the next session when we prepared the court calendar
6 but one the defense intends to file?

7 CDC[MR COOMBS]: That is correct, Your Honor. And, part of
8 that, we are addressing the motion to compel the grand jury of what
9 is in possession, custody and control, based upon the court's
10 discovery ruling about who is jointly--part of a joint investigation
11 and who is closely aligned, we believe that, based--once the court
12 rules on a grand jury, it may be much more easier to at least get the
13 Government to say, "Yes, these are in our possession, custody and
14 control. We do have an obligation under 701(a)(2) to hand these
15 specifically requested items over to the defense." In addition to
16 the 701(a)(6) requirement they have under *Brady*.

17 MJ: All right, so, the motion to compel grand jury, has that
18 been marked as an Appellate Exhibit?

19 CDC[MR COOMBS]: It has, Your Honor. And, before we go into
20 that--is the court's intent to go into that now?

21 MJ: No, I just want to identify it.

22 All right, I am looking at what has been marked as
23 Appellate Exhibit 48, which is a defense request for partial

1 reconsideration of discovery, and that is dated on 12 April 2012.
2 And, this is also a motion that was not initially anticipated, is
3 that correct?

4 CDC[MR COOMBS]: That is correct, Your Honor. And, we will
5 cover that in oral argument as to why that is so.

6 MJ: Okay, and I have the prosecution response to that motion
7 which is Appellate Exhibit 49. And, the defense reply, which is
8 Appellate Exhibit 50. All right, and what other--so, we have the
9 motion to compel discovery of the grand jury materials, now are the
10 parties prepared to litigate this motion today?

11 CDC[MR COOMBS]: Yes, Your Honor.

12 TC[MAJ FEIN]: Yes, Your Honor.

13 MJ: Okay. What other spinoff motions do we have from the
14 motion--the ruling on the motion to compel, other than the grand jury
15 and the one that you intend to file next?

16 CDC[MR COOMBS]: That would be it, Your Honor. Obviously,
17 the motion to dismiss all charges is related to this, but other than
18 that, for discovery, that would be it.

19 MJ: All right. Which would you prefer to litigate first?

20 CDC[MR COOMBS]: Ma'am, the grand jury motion has the control
21 issue.

22 MJ: All right. Government, are you prepared for that?

1 TC[MAJ FEIN]: Your Honor, we are. May we have a five minute
2 comfort break before we begin?

3 MJ: All right. Why don't we make it longer than that; why
4 don't we come back and reconvene at 20 minutes until 1200.

5 Court is in recess.

6 [The Article 39(a) session recessed at 1123, 24 April 2012.]

7 [The Article 39(a) session was called to order at 1146, 24 April
8 2012.]

9 MJ: This Article 39(a) session is called to order.

10 Let the record reflect that all parties present when the
11 court last recessed are again present in court.

12 At issue is the defense request for partial reconsideration
13 of discovery ruling.

14 CDC[MR COOMBS]: Ma'am, before we go on to that, just a real
15 quick point of clarification. With regards to the Department of
16 State damage assessment, the government indicated that it was
17 providing those damage assessments *ex parte* for the court to
18 consider. I wanted to make sure that they weren't also providing the
19 department of state's essential request for reconsideration *ex parte*.

20 MJ: All right, is that the plan?

21 TC[MAJ FEIN]: Your Honor, as of today, that is the plan.

22 MJ: What is the authority---

1 TC[MAJ FEIN]: We are not submitting the Department of State's
2 cover letter *ex parte*. The defense shouldn't--until I receive the
3 final one, until the prosecution does, it cannot say one hundred
4 percent, but what has been intimated to us is that once we receive
5 that cover letter, that cover letter will be provided to the defense
6 in a classified disclosure.

7 MJ: All right, so just to make sure we are all operating under
8 the same idea here, the damage assessment itself is coming to the
9 court *ex parte*, but the rationale for reconsideration will go to both
10 sides?

11 TC[MAJ FEIN]: Yes, ma'am.

12 MJ: All right, would the defense like to argue the motion?

13 CDC[MR COOMBS]: Yes, ma'am.

14 Ma'am, the defense asks the court to compel discovery of
15 grand jury testimony as being in the possession, custody and control
16 of the government under R.C.M. 701(a)(2).

17 By way of background, just to provide the court an
18 understanding of how this issue began and why the defense filed this
19 motion, initially, the government indicated that out of an abundance
20 of caution they would produce all grand jury testimony that was
21 relevant and necessary. And, because the defense was unclear as to
22 what the government actually meant by that, we sought clarification
23 by e-mail. The government responded to a couple of e-mails but

1 within a telephonic 802 conference, the government explained that
2 much of the grand jury testimony had nothing to do with my client,
3 and so, they would produce all grand jury testimony that had
4 something to do with my client but everything else, they would not
5 produce. We sought further clarification to ensure what they meant
6 by that because initially it was relevant and necessary and now it
7 went to everything relevant to your client. At that time, when we
8 sought additional clarification, the government stated that they
9 would produce only the grand jury testimony that was relevant to the
10 *Brady* information, the *Brady* material. So, we went from relevant and
11 necessary to everything related to your client, to only *Brady*
12 material.

13 The government's latest tactic now is to say that the grand
14 jury testimony is not within its possession, custody and control and
15 therefore it should not be required to hand that information over. I
16 would note that this is something that the defense predicted the
17 government would say on 12 March when we indicated that the
18 government has consistently denied discovery. And, specifically with
19 the grand jury request, consistently denied discovery under a
20 relevant and necessary standard but has never maintained that the
21 grand jury was not within its possession, custody and control. Now,
22 the defense submits that the grand jury testimony is, in fact,
23 qualifying under R.C.M. 701(a)(2). The government responds to our--

1 the defense's maintaining that it falls under 701(a)(2) by stating
2 the following: the FBI is a subordinate organization to the
3 Department of Justice. Neither organization is a DoD agency
4 operating under Title 10 status or subject to military command.
5 Thus, the FBI and the Department of Justice files are not within
6 possession, custody or control of military authorities. In other
7 words, it seems that if the government is submitting that because the
8 FBI and the Department of Justice are not subject to military command
9 or not under a Title 10 status, which no one would dispute, this
10 somehow means that this discovery is not within their possession,
11 custody and control. The defense submits that the government is
12 confusing what the rule states. The rule does not speak to whether
13 or not these other agencies, such as the FBI or the Department of
14 Justice are under military control. What the rule is concerned with
15 is whether or not the files from these other agencies are within the
16 possession, custody and control of the military authorities. So, the
17 relevant question here then is: "Is the grand jury testimony within
18 the possession, custody and control of the United States government,
19 the military in this instance?" And, the defense would submit that
20 the answer is, "Yes".

21 Now, there is no law directly on point as for what is
22 within the possession, custody and control, other than 701(a)(2).
23 But, when you look at 701(a)(2), the discussion in that rule points

1 you to the federal rule, Federal Rule of Practice 16. In fact,
2 Federal Rule of Practice Rule 16 and R.C.M. 701(a)(2) are identical
3 word for word, comma for comma, with the exception of Rule 16 says,
4 "government" and when they say government they mean the prosecution
5 and 701(a)(2) says, "military control". When they say that, they
6 actually mean the trial counsel. And, according to the discussion
7 within the rule, they mean other military as well. So, the intent is
8 701(a)(2) to be even broader than Rule 16. Not just within the
9 custody of the trial counsel, but any other military authority. So,
10 when you look at Federal Rule 16, you see when they look at what is
11 in the possession, custody and control, the key there is whether or
12 not that agency is an agency which is either part of a joint
13 investigation or closely aligned.

14 One of the cases cited by the defense, *United States v.*
15 *Upton* said the inquiry is not whether the United States Attorney's
16 Office physically possesses the documents. In this case, the
17 argument would be it is not whether or not the trial counsel here
18 physically possesses the documents, the inquiry is to the extent in
19 which there has been a joint investigation, that determines whether
20 or not it is within their physical possession, custody or control or
21 what they can actually obtain.

22 Many cases within the Federal Rules that interpret Rule 16
23 go even further. They state that even if there is no joint

1 investigation or close alignment, documents are within the
2 possession, custody, control of the government where the government
3 has access or knowledge of the documents. Now, I have cited numerous
4 cases in the motion, but *Giffen* is perhaps the best case for the
5 court to take a look at, at 379 Fed Supp 2d 337. There, much like in
6 this case, the defense sought documents from--that were classified,
7 from the CIA and from the Department of State and there, much like in
8 this case, the government sought to say that it was not within their
9 possession, custody or control under Rule 16. The court said,
10 "Because the government acknowledges that it had reviewed the
11 documents related to the defendant at the CIA and Department of
12 State, during the course of its investigation, the defendant is
13 entitled to review those classified documents to assess the viability
14 of its defense." In other words, the court determined because the
15 government had access to these documents and had used its access to
16 go to the Department of State and to the CIA in order to take a look
17 at the documents for itself, it could not then claim the documents
18 were not within its possession, custody and control, just because the
19 documents were physically at the CIA or the Department of State.
20 Likewise, *United States v. Poindexter* talks about an Office of
21 Special Counsel having full access to the Office of the Vice
22 President and also to the President with regarding giving documents
23 during its course of its investigation. And, when the defense asked

1 for the similar access in order to obtain documents from the Office
2 of the Vice President and the President, in that case, the special
3 counsel said "look, it's not within my possession, custody and
4 control." Similarly in that case, the court said you cannot take the
5 full benefit of having access to what you want and ask for the
6 ability to see the documents and then when the defense asks for that
7 same access you then state, "It is not within our possession, custody
8 or control." In that case, similarly, the court said it is in fact
9 in your possession, custody and control and it ordered discovery.

10 It is important to explain or understand why this has to be
11 the case. It has to be this way. This is the only way it makes
12 sense and that is because if in fact the government could have full
13 access to other agencies' documents for the benefit of its case, in
14 preparing its case and developing its trial strategy and techniques
15 and tactics or how it is going to prosecute its case, but at the same
16 time, leave any document within that agency that it believes might be
17 beneficial to the defense, and at that time, be able to hide behind
18 the fact that it is not within their physical possession, custody or
19 control, that would obviously not fit with our rules of discovery or
20 sense of fair play or even Article 46. The government should not be
21 able to stash away harmful documents or leave harmful documents with
22 other agencies and then hide behind the fact that it is not

1 technically within their physical control when all the while they can
2 easily obtain the documents if they want to.

3 The court in *Trevino* which is cited by the defense, puts it
4 very succinctly, "Certainly the prosecutor would not be allowed to
5 avoid disclosure of evidence by the simple expedient of leaving
6 relevant evidence to repose in the hands of another agency while
7 utilizing its access in preparing its case for trial. Such evidence
8 is plainly within Rule 16's control." And, unfortunately, that is
9 what we have in this case. As the Court has determined, the
10 Department of Justice and the FBI have had a joint investigation, or
11 at least the FBI is part of a joint investigation. The Department of
12 Justice is closely aligned. The government itself has said they have
13 worked with the Department of Justice in the investigation of this
14 case. To allow them to have full access of the Department of
15 Justice, FBI files and then when the government wants to, to leave
16 anything they want there, and when defense says, "Hey, we would like
17 to get access to the grand jury testimony", allow the government at
18 that point to say, "Oops, sorry, it is not within our physical
19 possession custody or control." That obviously is not within the
20 spirit of 701(a)(2); would not be within the spirit of our open
21 discovery and certainly not within Article 46, to allow the trial
22 counsel to have this access and yet deny the defense similar access.
23 Accordingly, the government should not be permitted in this case to

1 state that the grand jury documents are not within their physical
2 possession, custody or control when easily they could be. In fact,
3 they have even indicated that they have reviewed the documents, so it
4 is within their physical----

5 MJ: You are saying, "The documents", what is it you are asking
6 for?

7 CDC[MR COOMBS]: I am asking for the grand jury testimony
8 from this case.

9 MJ: And it is the defense's position that those are documents?

10 CDC[MR COOMBS]: Yes, Your Honor. So, I anticipate that
11 there is a transcript and so, the grand jury testimony would be in
12 transcript form. It is not in transcript form, which I would
13 anticipate it would be, then we would be talking about audio files.
14 In some way, shape or form, there is grand jury testimony. And, the
15 government has indicated as such.

16 MJ: Do you have any cases, because I am looking at R.C.M.
17 701(a)(1)(C), which talks about any sworn statement or signed
18 statement relating to an offense charged in the case in the
19 possession of the trial counsel, are you aware of any case involving
20 prior testimony interpreted to be a document under 701(a)(2)(A)?

21 CDC[MR COOMBS]: And, just so I understand your question,
22 Your Honor, you are looking at R.C.M. 701(a)----

1 MJ: (1)(C), which says, "As soon as practical after service of
2 the charges, the trial counsel should provide the defense with copies
3 of any sworn or signed statement relating to an offense charged in
4 the case in the possession of the trial counsel."

5 CDC[MR COOMBS]: Okay.

6 MJ: And it seems that if a statement is a document, isn't that
7 kind of redundant with (2)(A)?

8 CDC[MR COOMBS]: Well, regardless whether or not--again, if I
9 understand you correctly, the 701(a), excuse me, 701(c)[sic], any
10 sworn or signed statement, probably under R.C.M. 701 we are talking
11 about sworn statements that would be taken as part of an
12 investigation. And so, you would hand those over as part of the
13 packet that you normally would for open discovery. Technically, I
14 guess the grand jury testimony would be sworn testimony, obviously.
15 Whether or not that will be falling under 701(c) [sic], could be
16 debatable. But, with regards to 701(a)(2), when you are asking for
17 specific items, and there is no doubt of these items normally would
18 be outside of the custody and control if it weren't for the fact that
19 this is part of a joint investigation, part of a closely aligned
20 agency with regards to the government's case. So, that is why it
21 would fall under 701(a)(2) with regards to whether or not we have
22 access to it because we are asking for specific items. I believe the
23 701(c)[sic] would be almost an independent duty on the part of the

1 government to hand this stuff over even without request if they were
2 aware of sworn statements.

3 MJ: The other question I had for you is, I understand all of
4 these federal cases, but in the federal courts, Rule 16 does not
5 apply to grand jury testimony. So, I don't understand how that--any
6 of these cases affect grand jury testimony.

7 CDC[MR COOMBS]: Well, with regards to these cases I am
8 citing, ma'am, for what is closely aligned, what is within the
9 possession, custody and control of the military, I am not citing them
10 for the, obviously, the proposition of whether or not we have access
11 to them. Rule 16 and maybe within the federal practice, I haven't
12 reviewed the cases to be able to be responsive to that question, but
13 I would state that Rule 16 might say you are not eligible to the
14 grand jury testimony probably within that case is what I would
15 imagine. I do not know if Rule 16 would apply to grand jury
16 necessarily in a collateral case. But, more importantly in this
17 instance, I think the issue is Rule 16 helps establish how R.C.M.
18 701(a)(2) should be generally interpreted. But, I don't think we can
19 forget the fact that within the military, we pride ourselves on open
20 discovery, much more expansive than what a civilian accused would get
21 in state or federal practice. So, while Rule 16 may have certain
22 limitations, R.C.M. 701(a)(2) doesn't. You ask for the item, if it
23 is in your possession, custody or control, you need to hand it over.

1 MJ: Well, for grand jury testimony, isn't it under the
2 possession, custody and control of the District Court where the grand
3 jury sits?

4 CDC[MR COOMBS]: Well, here again, I am only relying upon
5 what the government has indicated. But, apparently, and that is why
6 there is some confusion, and I put it in a footnote whether or not
7 this resides with the Department of Justice or with the FBI. The
8 government seems to indicate that it resides with the FBI, which did
9 not make sense to the defense, but out of an abundance of caution, we
10 indicated to the extent that it is within the FBI's file cabinet.
11 Then, obviously, being an agency that is part of a joint
12 investigation then it is within the possession, custody and control
13 of the military. If it is within the Department of Justice file
14 cabinet being a closely aligned agency which the government has
15 consistently gone to in order to develop its case, again, we would
16 say it is in the possession, custody and control. At no point has
17 the government indicated that the grand jury testimony is not within
18 the possession of one of those two agencies. In fact, they have
19 stated that, as I have said, over a period of time either they would
20 give us everything or they would give us those things, parts of the
21 grand jury that is relevant to my client and the latest I guess
22 example, before saying is not within their possession, custody or
23 control is that they would give everything from the grand jury that

1 was *Brady*. So, the government has access to this. I am not for sure
2 is through the FBI or Department of Justice. So, subject to your
3 questions, ma'am.

4 MJ: All right. Thank you.

5 CDC[MR COOMBS]: Thank you, ma'am.

6 MJ: Government?

7 TC[MAJ FEIN]: Your Honor, as you know, we are arguing the
8 defense's interpretation of R.C.M. 701(a)(2), but regardless of the
9 court's ruling today, the prosecution, the United States, has--is
10 continuously reviewing and has reviewed material for any type of
11 *Brady*--reviewed information for any type of *Brady* or 701(a)(6)
12 material, and that includes the subject of the defense's request,
13 which is any type of grand jury testimony.

14 MJ: Okay, let me ask you a quick question first. What is it,
15 in this grand jury investigation, if anything, that the government
16 either has turned over to the defense or intends to turn over to the
17 defense voluntarily, absent a court order?

18 TC[MAJ FEIN]: Yes, ma'am. The subject matter of grand jury
19 subpoenas is located within the FBI file and that information is
20 being reviewed under the *Brady* 701(a)(6) standard. And pursuant to
21 the disclosure of FBI material, that grand jury material will be
22 provided in the FBI file. As far as grand jury testimony, the
23 government has reviewed that information at the US Attorney's office

1 and any information that falls within the 701(a)(6) or *Brady*
2 standard, we will disclose that information once we get the final
3 approval to turn it over to the defense.

4 MJ: When you say, "Once you get final approval", what does that
5 entail?

6 TC[MAJ FEIN]: Your Honor, that entails the US Attorneys in the
7 Eastern District of Virginia going to the federal judge and receiving
8 final approval for us to turn over the substance of grand jury
9 testimony to the defense.

10 MJ: What rule applies to release of grand jury testimony?

11 TC[MAJ FEIN]: Your Honor, Rule 6 of the Federal Rules of
12 Criminal Procedure.

13 MJ: What does it require?

14 TC[MAJ FEIN]: One moment please, Your Honor. [Pause] Your
15 Honor, could you repeat the question?

16 MJ: All right, you've told me Rule 6 applies to disclosures of
17 grand jury testimony.

18 TC[MAJ FEIN]: Yes, ma'am.

19 MJ: So, if the government wants--well, A. do I have authority
20 to order disclosure of grand jury testimony?

21 TC[MAJ FEIN]: No, Your Honor.

22 MJ: All right, so, say I issue a court order, what happens?

1 TC[MAJ FEIN]: Your Honor, if you issue a court order then the
2 Army prosecutors will go to the Eastern District of Virginia and
3 speak to the US Attorneys and they will go to a federal judge to make
4 this request. We do not anticipate that needing to occur. This
5 process is already working after the review we completed two weeks
6 ago and we do expect to have the approval to turn over this material
7 that we have identified to the defense.

8 MJ: Now, is the only material that you intend to turn over from
9 the grand jury, *Brady* material?

10 TC[MAJ FEIN]: Yes, Your Honor. *Brady* and 701(a)(6). However,
11 if there is, for instance, *Jencks* material in there, under R.C.M.
12 914, then that material has already been designated by name, and if
13 one of those individuals the government calls as a witness, then we
14 are required under that 914 to turn over that material. In fact,
15 under 914, I think it is (f)(3), the R.C.M. specifically contemplates
16 grand jury testimony as being discoverable under *Jencks*, which then
17 goes back to the ultimate issue today, which is: "Does 701(a)(2)
18 apply to organizations outside of the control of military
19 authorities?" And, the prosecution argues, the United States argues,
20 that plain reading of the rules would indicate that the drafters
21 never intended to expand 701(a)(2) to outside, literally, the
22 possession of the military authorities within the Department of
23 Defense.

1 MJ: Well, I am going to ask you the same question I asked the
2 defense. Does R.C.M. 701(a)(2) apply to testimony?

3 TC[MAJ FEIN]: Your Honor, the United States ultimately would
4 argue it doesn't, only because 914 specifically does, in the
5 paragraph, talk about testimony and statements, when they are
6 discoverable and when they are not.

7 MJ: Do you have any case law to support that either way?

8 TC[MAJ FEIN]: No, ma'am, we do not.

9 MJ: Proceed.

10 TC[MAJ FEIN]: So ma'am, the ultimate issue under 701(a)(2),
11 again, goes back to, is whether the military authorities--so, the
12 United States argues that first, if you just look at--if the court
13 would review what the drafters have actually written. First,
14 701(a)(2) specifically states, "Books, papers, documents, et cetera
15 in the possession, custody or control of military authorities", that
16 is (a)(2)(A). (a)(2)(B), again, possession of military authorities.
17 The rule is established even within the discussion to--or even as the
18 defense has explained, to ensure we have open file discovery within
19 our courts-martial. This is the rule that we rely on for open file
20 discovery but it only allows for open file discovery for that which
21 we have the actual authority to open our files with, which is why the
22 United States argues 701(a)(2) only applies to be purely within DoD.

1 This has already come up in this court-martial during
2 pretrial motions. It came up during the issue of *Touhy* requests.
3 Even with *Touhy* requests there is Department of Defense regulations
4 that specifically say that the *Touhy* regulations for criminal
5 prosecution for courts-martial do not apply within the Department of
6 Defense but outside of the Department of Defense, we as Army
7 prosecutors have no ability to voluntarily elicit government
8 employees' information without following formal procedures. So,
9 first, Your Honor, the plain reading. Second, the defense seems to
10 be confusing the standard under *Williams*, which is the CAAF's
11 interpretation of our *Brady* obligations in 701(a)(6), establishes the
12 three different categories of information: law enforcement
13 investigations; closely aligned organizations and their investigative
14 activities, such as a state or as we have said previously in our
15 filings and on the record, federal law enforcement investigations;
16 and the Department of Justice. But, that obligation under *Williams*
17 is simply, for the prosecution, a minimum, the minimum obligation, to
18 go out, search the files for *Brady* material and then disclose that
19 *Brady* material. And, the prosecution has always been doing that and
20 will continue even for grand jury testimony. That standard in the
21 same rule, R.C.M. 701, applies to the entire government so long as it
22 is within the criteria of *Williams*. *Williams* was decided while
23 701(a)(2) was in the Rules and the court did not, although they did

1 reference 701(a)(2), they did not impute that requirement of
2 searching all of the big US government files for 701(a)(2), instead
3 its 701(a)(6) for *Brady* material.

4 Your Honor, the final point, it goes back to the question
5 you ultimately asked, which is, where is the authority? Ultimately,
6 the authority lies in the federal courts and that authority is being
7 sought and the prosecution does not anticipate any issues with
8 turning over the *Brady* material that it has reviewed in the grand
9 jury testimony. Subject to any further questions.

10 MJ: All right, now I think--thank you.

11 Mr. Coombs?

12 CDC[MR COOMBS]: Briefly, Your Honor. When you look at
13 R.C.M. 701(a)(2), it talks, what is within the possession, custody
14 and control of military authorities. If the interpretation were as
15 such as the government is arguing, that R.C.M. 701(a)(2) only applies
16 to records within military, not any other government agency, the
17 drafters were free to say that. In fact, then it would be much
18 clearer, not just simply saying, "Possession, custody and control",
19 just saying, "Only military authorities. That is it, that is all
20 701(a)(2) applies to." That's the interpretation the government
21 believes 701(a)(2) should be read by this court, to me. But, that
22 can't be case. It simply can't be the case. If you take a look at
23 Federal Rule 16 then, you would say that an accused in federal court

1 is going to fare much better than an accused in military court. And
2 why? Because an accused in federal court can say, "Look, with
3 regards to US Attorneys, if it is not within your immediate
4 possession, custody and control, but we know that this is a joint
5 investigation with some other agency other than US attorney or a
6 closely aligned agency, then Federal Rule 16 is going to get me the
7 document."

8 MJ: Not the grand jury testimony, it's not.

9 CDC[MR COOMBS]: Not perhaps grand jury testimony, again, the
10 defense is not ready at this point to respond whether or not
11 collateral grand jury testimony would be discoverable under Federal
12 Rule 16. But, even setting that aside, the key issue is maybe not
13 just the grand jury, the key issue is under Federal Rule 16 it is not
14 just within the possession, custody and control of the US Attorney,
15 it is not a factual question, it is a legal question. What other
16 agency is closely aligned or part of a joint investigation? And if
17 that answer, and you look at the federal case law cited by the
18 defense, it is clear that a US Attorney can't just hide behind the
19 fact that it is not within his possession, custody or control if it
20 is part of a joint investigation or part of a closely aligned agency
21 that they have had the ability to go to and seek documents from. The
22 trial counsel here now is saying, "Well, that may be Federal Rules
23 but under R.C.M. 701(a)(2) an accused doesn't fare so well." Never

1 mind the fact that we say the discovery within the military is much
2 broader than federal counterpart and state counterpart. Never mind
3 the fact that we have Article 46 which says, "Equal access".
4 Disregard all of that. 701(a)(2), when you just read the plain
5 meaning of it applies only to military authorities. So lo and
6 behold, that is why we think the Department of Justice and FBI, they
7 are not under Title 10 status, they are not under military control,
8 so, "Oops, too bad, we can go there. We can seek their cooperation.
9 We can seek documents from them, but Defense, you don't have that
10 luxury. Too bad your client is not charged in the federal court, in
11 which case then you would have some case law that would back up that
12 you, in fact, get custody and control and possession of anything that
13 we have the ability to have custody and control and possession of."

14 MJ: All right, Mr. Coombs, let us walk through this.

15 CDC[MR COOMBS]: Sure.

16 MJ: R.C.M. 701 is a rule of discovery.

17 CDC[MR COOMBS]: Yes, Your Honor.

18 MJ: R.C.M. 703 is a rule of evidence production.

19 CDC[MR COOMBS]: Yes, Your Honor.

20 MJ: Now, let's say we are the *United States vs. Libby*, one of
21 the cases that you had.

22 MJ: Okay.

1 MJ: And, the CIA has documents that, it is a joint case just
2 like the *Libby* issue. Now, if the trial counsel has gone over to the
3 CIA and looked at the documents, where is it under R.C.M. 701 because
4 they are the ones that have to provide discovery, where is the
5 enforcement mechanism? Where is--so I say it is discoverable, and
6 the CIA tells the government, "No." How does the government have any
7 kind of control or authority over it?

8 CDC[MR COOMBS]: Okay.

9 MJ: Do you have to go to 701--703?

10 CDC[MR COOMBS]: Well, what will happen, and this is--there
11 is a small gap here, but this is the defense's position on this. In
12 a pretrial, we are talking 701. That is where we are at, in
13 pretrial. So, anytime you----

14 MJ: And you are talking about pretrial, okay.

15 CDC[MR COOMBS]: Yeah, exactly, ma'am.

16 MJ: Okay, yes.

17 CDC[MR COOMBS]: So, 701 would be the rules that would
18 govern. And, this would be something that is within the possession,
19 custody and control of the trial counsel under 701(a)(2).

20 MJ: How, if the CIA has it?

21 CDC[MR. COOMBS]: Well again, this is not a factual issue on--
22 with regards to whose file cabinet is it currently located.

23 MJ: Well, what is their authority to get it under 701?

1 CDC[MR COOMBS]: Again, the 701(a)(2) would say if it is part
2 of a closely aligned investigation or joint investigation, if it is
3 within your possession, custody and control and in many of the cases,
4 the court says all it takes is the agency, in this case it will be
5 the trial counsel, calling up any of these agencies and saying, "Can
6 we have the document?" Now, if the agency says, "No." Even though
7 legally this is within their possession, custody or control because
8 it is part of a joint investigation, then the only way you would ever
9 get the document, you are correct, we would have to do a production
10 order under 703 and actually enforce the fact that it is within their
11 possession, custody and control from a legal standpoint under
12 701(a)(2). The government now has gone to, let's say for argument's
13 sake, the Department of Justice for the grand jury testimony and the
14 Department of Justice says, "No, we are not--I know we let you look
15 at it all you wanted before, but now that we know that you are going
16 to hand it over to the defense, no, we are not giving it to you."
17 Then, yes, Your Honor, we are in that vacuum where 701(a)(2) would
18 say, "You should have handed this over." But, the enforcement
19 mechanism that the court would have would have to be under 703. And,
20 it is unfortunate that 701(a)(2) doesn't have the enforcement
21 mechanism for what is in the possession, custody and control, and the
22 reason why there is probably not a lot--well, there is not really any
23 military case law on this is the fact that we have such an open

1 discovery system. This does not come up because the trial counsel
2 hands over stuff within their possession, custody and control. In
3 this case though, it appears that even though they have access to it,
4 there is pushback as to what should be given to the defense. And, we
5 see that most readily with the Department of State documents to
6 where, even now, the Department of State is wanting to re-litigate an
7 issue as a third-party that has already been settled by this court
8 that they should produce the documents. So, I am sensitive to the
9 fact that the government is dealing with other agencies that may have
10 their own opinion as to what should be given to the defense. But,
11 that does not eliminate the legal issue of whether or not this is
12 within your possession, custody or control from the standpoint of a
13 joint investigation or a closely aligned agency.

14 MJ: All right, thank you.

15 CDC[MR COOMBS]: Thank you, Your Honor.

16 MJ: As I advised the parties earlier, I intend to take this
17 issue, as well as the defense is going to also argue today the motion
18 to dismiss all charges with prejudice, as well as a bill of
19 particulars issue today. At that point, we are going to close the
20 session, I will take it under advisement and have rulings ready to go
21 tomorrow when we convene to announce those rulings as well as to
22 litigate the other motions that have been filed in this case, the
23 other motions to dismiss.

1 Are the parties ready to proceed with the defense motion to
2 dismiss all of the charges?

3 CDC[MR COOMBS]: Yes, Your Honor.

4 TC[MAJ FEIN]: Yes, Your Honor.

5 MJ: All right, Mr. Coombs?

6 And, for the record, that has been marked as Appellate
7 Exhibit 41, the prosecution response is Appellate Exhibit 42 and the
8 defense reply is Appellate Exhibit 43.

9 CDC[MR COOMBS]: Your Honor, it is abundantly clear that the
10 government did not understand its discovery obligations and it did
11 not understand discovery in three important aspects:

12 First, the government did not understand *Brady* under R.C.M.
13 701(a)(6);

14 Second, the government did not understand its general
15 discovery requirements under R.C.M. 701(a)(2); and

16 Third, the government did not understand classified
17 discovery under M.R.E. 505.

18 First, the *Brady*. How do we know that the government did
19 not understand its *Brady* requirement? Well first, in its response
20 motion they never cite R.C.M. 701(a)(6), the military's version of
21 *Brady*. Within their 15 page response motion, that rule is never
22 cited and you would anticipate when you are talking about a motion to
23 compel discovery, in particular *Brady* discovery, that if the

1 government understood its *Brady* requirement they would have cited
2 701(a)(6). Second though, you see within their motion they actually
3 cite *Brady* but they cite the wrong standard. And, I quote, the
4 defense--excuse me, the government says, "favorable evidence is
5 subject to constitutionally mandated disclosure when it could
6 reasonably take to put the whole case in such a different light as to
7 undermine confidence in the verdict." The government cites *Cone v.*
8 *Bell* and then it goes on to say that, "Evidence is material within
9 the meaning of *Brady* when there is a reasonable probability that had
10 the evidence been disclosed, the results of the proceedings would be
11 different." That is what the government cited in its motion for its
12 understanding of *Brady*. Literally, the smoking gun. The game
13 changing type evidence, that is what it believed its *Brady*
14 requirements were within its motion. That is not the relevant
15 standard. That is the federal appellate standard but that is not the
16 relevant trial standard.

17 And, the defense cited *United States v. Savian* and there,
18 the court explained why that is problematic. And, I will just quote
19 just a small portion of that opinion. Using the federal appellate
20 standard is problematic and apparently has happened within the
21 federal court as well where US attorney would use the federal
22 appellate standard. And, the *Savian* court said, "This permits
23 prosecutors to withhold admittedly favorable evidence whenever the

1 prosecutors in their wisdom conclude that it would not make a
2 difference to the outcome of the trial. The question before trial is
3 not whether the government thinks the disclosure of the information
4 or evidence it is considering withholding might change the outcome of
5 the trial going forward but whether the evidence is favorable, and
6 therefore must be disclosed." That is the correct standard. But in
7 addition to not understanding its correct *Brady* standard, the
8 government also did not believe its *Brady* obligations apply to
9 evidence relevant for sentencing. The government did not realize
10 that *Brady* required it to produce any evidence that reasonably tended
11 to reduce guilt, reduce--or reduce punishment. And, how do we do
12 that? Again, in their response motion, they state--they say, "The
13 proper standard of materiality must reflect our overriding concern
14 with justice of the finding of guilt." In further evidence of that
15 understanding that it did not apply to any evidence that tended to
16 reduce guilt the government states with regards to the damage
17 assessments that it refused to produce the damage assessments as not
18 being relevant and necessary for merits. However, when this court
19 asked them, "Is there anything within the damage assessments that may
20 be relevant for sentencing?" And then the court[sic] said, "Well,
21 yeah, there is some stuff in there that might tend to reduce
22 punishment."

1 The fact that the government did not believe that that was
2 relevant and necessary, again they were using the 703 standard, but
3 the fact that they did not think that was relevant and the fact that
4 when they cited *Brady* it made it clear that they were saying *Brady*
5 only applied to merits shows just how off the mark they were with
6 regards to the *Brady* standard. Now, most recently, we see with the
7 Department of State, although not referenced in our motion, but we
8 see now that they are trying to say that preliminary reports, reports
9 that are not technically final in some way shape or form, that also
10 apparently does not fall under *Brady* under the government's
11 understanding of *Brady*. But, also, and probably even clearer of its
12 intent, when the court asked then Captain Fein to state what does
13 *Brady* require, Captain Fein cited a rule that was not R.C.M.
14 701(a)(6). Again, showing their understanding of what *Brady*
15 required. Any one of these things individually would show that the
16 government did not understand *Brady* but collectively they provide
17 overwhelming evidence that the government was operating under a
18 standard that was not R.C.M. 701(a)(6). In addition to not
19 understanding R.C.M. 701(a)(6), the government does not understand
20 R.C.M. 701(a)(2). Much like with 701(a)(6), not once in its response
21 motion does it cite 701(a)(2), in fact, over 35 times it cites R.C.M.
22 703 as the appropriate standard. And, when you look at R.C.M. 703,

1 obviously that is dealing with production of evidence at trial, not
2 the pretrial discovery stage.

3 MJ: Well, wouldn't it also be dealing with production of
4 evidence for pretrial discovery if it's found to be relevant and
5 necessary? I mean, you can't get it under R.C.M. 701.

6 CDC[MR COOMBS]: Again, depending upon whether--the R.C.M.
7 703 standard is going to be production at trial. If the Court orders
8 discovery, it could be discoverable under R.C.M. 701 if it is
9 appropriately 701(a)(2) or 701(a)(6).

10 MJ: But not if the government does not have it?

11 CDC[MR COOMBS]: Well, this is clear that the government did
12 not understand that in this case anyways because they cited 703 with
13 regards to the T-SCIF computers. They said the T-SCIF computers were
14 not relevant and necessary under R.C.M. 703. So, it is very clear
15 that the government was not saying, "Hey, this is not within our
16 possession, we technically do not have the ability to give it over
17 unless we do an R.C.M. 703 standard." They were clearly applying 703
18 across the board. And so, it is clear in this instance again they
19 did not understand their discovery requirements under R.C.M.
20 701(a)(2). Finally, the government had no idea how the classified
21 discovery system worked. When I said at the last oral argument, that
22 the government's position with regards to classified discovery was
23 classified, denied. That is exactly the position that they took.

1 And, we see this not only from their response motion and from the
2 oral argument but most clearly from an e-mail from then Captain Fein
3 and, it is a little bit lengthy, but I will quote this because it
4 clearly indicates the government's position. "As litigated at the
5 motions hearing, the government's position is that classified
6 information does not fall under R.C.M. 701. The information the
7 defense has requested in discovery is classified and the prosecution
8 has no reason to believe it is not classified. Because the
9 information is classified, R.C.M. 701 does not apply as per 701(a)
10 and (f) which leaves the prosecution to use the standards under
11 M.R.E. 505 along with *Brady* and its progeny. The defense provided no
12 authority to apply R.C.M. 701(a)(2) or (6) to classified information.
13 And, all authorities only reference unclassified information. The
14 prosecution has relied on M.R.E. 505 and *Brady* for regulation of what
15 classified evidence is discoverable. The United States must always
16 weigh the necessity to provide the defense access to classified
17 information and protect national security. The normal open file
18 procedure in military justice process does not, and cannot, apply to
19 classified information. Just because the defense requests classified
20 information, does not mean it is discoverable as outlined in M.R.E.
21 505 and relevant case law. The United States understands its
22 constitutional obligations to ensure a fair trial while balancing
23 national security interests by protecting classified information."

1 That is a standard that they applied, saying that 701
2 didn't even apply to classified cases. As the court said, that is
3 not true. R.C.M. 701 does apply to classified information. If the
4 defense wants--excuse me, if the government wants to, they can invoke
5 a privilege, but until they do so, 701 applies. So, the government
6 was flat out wrong when they said that R.C.M. 701 did not apply to
7 classified information cases.

8 Now, why is dismissal of all charges with prejudice the only
9 appropriate remedy in this case? Well, in light of the widespread
10 discovery violations, the misunderstanding by the government of
11 701(a)(6), 701(a)(2) and M.R.E. 505, dismissal with all prejudice--of
12 all charges with prejudice is the only available remedy and I will
13 explain why.

14 Since this case has begun, the government has been
15 apparently doing its discovery searches and they have been doing that
16 under a *Brady* standard that is the wrong standard. And, we know that
17 again from their response motion and from their arguments. The
18 government has been looking for *Brady* that has been game changing
19 information. In one of our very first 802 conferences in person we
20 talked about whether or not there was any *Brady* material out there
21 and the government without blinking an eye said to the court, "We
22 have looked now for almost 2 years and there is no *Brady* material; no
23 *Brady* material. And, that precipitated the defense to talk about the

1 fact that well, if they have not found any *Brady* material and they
2 have been looking at all of these other agencies and now they are
3 looking at even the Department of Agriculture, that maybe we will go
4 ahead and say you have done your due diligence in the search because
5 we are more interested in the speedy trial. It was not until we
6 understood what they understood *Brady* to mean that we said, wait a
7 second, now we are not waiving that at all because, the government
8 was looking for *Brady* when it was game changing. They were looking,
9 if it was like a shot group, they were looking at something that was
10 really narrow, game changing type information which would explain why
11 they could not find anything. But, that is not *Brady*. *Brady* is a
12 shot group that is much wider than that, much bigger than that in
13 that not only does it negate guilt but reduce guilt or reduce
14 punishment. That is the appropriate *Brady* standard.

15 So, it stands to reason that if the government has been
16 looking for the last two years under the wrong standard that there is
17 *Brady* material out there. And, we know that is the case because when
18 the court finally said, "Hey look, you think there is anything *Brady*
19 for merits, but there is *Brady* for sentencing?", the government had
20 to concede, "Yes, there is". And just recently we received the 12
21 pages of unclassified discovery, kind of the first part of the *Brady*
22 information that we received. And, every one of those agencies
23 reporting back on the cables were saying the same thing, "No harm."

1 Nothing has affected our agency. There is no mitigation effort that
2 we need to take." And these reports come from 2010 and we just are
3 now getting them. Because again, the government was looking for game
4 changing type of information.

5 MJ: What is the defense's understanding of the timing of *Brady*
6 discovery?

7 CDC[MR COOMBS]: As soon as practicable. That is the timing
8 for *Brady* under 701(a)(6).

9 MJ: All right, isn't that a rule of discovery that applies
10 after referral?

11 CDC[MR COOMBS]: Well, it could, certainly as far as
12 701(a)(6) *Brady* material, the government's obligation to provide it
13 in our system is to provide this information as soon as practicable.
14 Usually that may be part of the initial preferral packet because you
15 are going into an Article 32, and that is why we asked for some of
16 the stuff. If, "As soon as practicable" is after referral, then
17 okay. But, the rule is, as soon as practicable, you will hand this
18 over. Now, the defense's position is, the only way to cure this,
19 knowing that the government has been looking at this all the while
20 through the wrong prism is to do a re-review of the whole thing.
21 Have them go back and look through all the information that they have
22 said they looked through under the very narrow shot group, but this
23 time through that information under the appropriate *Brady* standard.

1 And, the problem with that is, even though that may look on the
2 surface to be a remedy that might work, it won't work. And, the
3 defense will explain.

4 First of all, if the government has been doing this for the
5 last two years, going through 63-some agencies and other agencies
6 looking for information, there is no reason to believe that a re-
7 view will take any less time. It still will take a year, perhaps
8 two years depending upon how much information the government has to
9 look through. So, obviously if that were the case, due to the
10 government's own inability to understand its *Brady* obligation, we
11 would have speedy trial issues if we delayed this case for a year,
12 year-and-a-half for them to look for all of these documents.

13 Secondly, there is a problem with the fact that the
14 government obviously wouldn't want that to happen so they would rush
15 the review and they might stand up and say, "Your Honor, it is going
16 to only take 30 days for us to look through everything." Or, "It
17 will take 60 days." Well, they might say that because they want to
18 rush through it. It is their incentive to do so to avoid any speedy
19 trial issues. It is also their incentive to complete their review
20 quickly to say, "Look, no harm no foul." But, how carefully would
21 they be reviewing that information when they are under a speedy trial
22 clock to do so?

1 That leads to the next reason why this would not work, you
2 have inherent conflict of interest. If the government is looking
3 through this stuff and they are trying to find, now under the
4 appropriate standard of *Brady*, every time they find something, that
5 just underscores the *Brady* violation and the extent of it. So, there
6 is an incentive for them to look at it quickly into say, "Oh, we
7 don't really see anything here."

8 MJ: Okay, you say, "The *Brady* violation", what is, "The *Brady*
9 violation"?

10 CDC[MR COOMBS]: The *Brady* violation is the fact that the
11 government understood *Brady* to mean, "Game changing information".

12 MJ: I understand that, but what is the evidence of a *Brady*
13 violation?

14 CDC[MR COOMBS]: The evidence would be self-evident from the
15 standpoint of if they are looking under just game changing only, and
16 that is what they are saying they are looking, it is clear from the
17 fact that we have just received 12 pages of the stuff that dates from
18 2010. But, it is clear that there is information that is, in fact,
19 relevant to reducing punishment, which the government was not handing
20 over because, it: a) was not game changing, and, b) did not deal
21 with merits under their position. So, you have that conflict of
22 interest where they do not want to find anything because if they do,
23 obviously just underscores a *Brady* violation and the extent of it but

1 then the other issue is *Brady* material may be lost at this point.
2 The fact that they looked through it at one point through the
3 eyeglass of game changing only and now at least two years have gone
4 by and if they have to do a re-review at this point, they have to go
5 back to try to find the same information, you have a very real
6 possibility of the *Brady* material being lost. And, probably the best
7 example of that is the T-SCIF computers, stuff that they should have
8 seized and saved at the time. Even the CID indicated within the 2010
9 timeframe that they should seize and hold onto any computer that they
10 identify from the T-SCIF or TOC. The government states that what
11 that memorandum is intended to mean is anything from this point
12 forward. But, that is nowhere within that memorandum. That
13 memorandum just simply states, if you have a computer from the T-SCIF
14 or TOC, preserve it, we want it. And, rightfully so, they would want
15 to look to see if there is any relevant information there. Well,
16 ultimately we find out that because of the late date, we were able,
17 and after a motion to compel discovery, were able to identify 14
18 computers. And then lo and behold, of those 14 computers, well only
19 four have not been, you know, either wiped or inoperable. And then,
20 there was a fifth one that was partially wiped. It is clear that the
21 *Brady* information was lost.

22 MJ: How do you know that?

1 CDC[MR COOMBS]: Again, just looking for what it is ma'am.
2 The fact that you have just from the four full drives that we have,
3 we can show countless unauthorized items being added to the Soldiers'
4 computers. And the key issue here is, which I am sure the government
5 will ultimately state to the panel members during the case in chief,
6 "Oh, well, they might have added a few games, they might have added a
7 few different programs that allowed them to watch movies or allowed
8 them to do various things for entertainment value. But, lo and
9 behold, Wget, well, that is a terrible program and no one added
10 that." Well, in reality, that was a program that would assist any
11 intelligence analyst in doing their job. And, had we had access to
12 the other 14 computers, and we may still be able to show with other
13 stuff, but the defense's position would be that we would have found
14 Wget on another computer that had nothing to do with my client. And,
15 if that were the case, then clearly that would undercut any argument
16 of a nefarious purpose for that computer program.

17 MJ: But, at this point, that is pure speculation?

18 CDC[MR COOMBS]: No, it is not pure speculation. So, when we
19 look at the fact that people were able to add any program they wanted
20 and we look at the fact that there was a general belief, and we would
21 have this once we have the witnesses testify at trial of, if the
22 computer program was mission essential, you could add it. If you
23 believed it aided you in your job you could add it. So again, when

1 we get the benefit of the witnesses testifying perhaps then the court
2 would be able to put in better light the scope and the nature of the
3 lost information, especially when a witness testifies to the ability
4 to add any program that you wanted. But, with the proffer that we
5 gave, Mr. Milliman talked about that fact, that Soldiers viewed the
6 DCGS-A machine as their machine. And, they were constantly wanting
7 to either crack the password to add programs that they believed were
8 mission essential, or that he would see that they would add. Now, he
9 said they did not think it was very common but we have just looked at
10 four drives that the government has looked through and if I could,
11 could the court reporter pull the appellate exhibit for those?
12 [The court reporter gave Appellate Exhibit 56 to the civilian defense
13 counsel.]

14 CDC[MR COOMBS]: So, this is Appellate Exhibit 56. So this
15 is the government's response and everything from this point forward
16 is unauthorized on a DCGS-A computer. From four computers.
17 Everything from this point forward. So, the defense's position is
18 that if we had the benefit of the other computers, yes, we would, in
19 fact, find *Brady* material that would be favorable to the defense.
20 And, with regards to the *Brady* material, the whole point of this
21 discovery, and the court asked, "Well, when is *Brady* required?" The
22 whole point of discovery is to get it as soon as practicable, to get
23 it early on. And, that is our whole purpose for military discovery

1 in general. You want to avoid gamesmanship. We want to avoid trial
2 issues when you can actually provide discovery early so that the
3 defense can prepare its case. We can identify issues that we should
4 be able to raise and raise confidently because we have the discovery.
5 We should be able to identify witnesses and pursue leads based upon
6 discovery that we receive. A diligent defense counsel looks through
7 every page provided and sees where has the government missed the boat
8 on something. Where can I exploit something, where can I point out
9 an issue that they didn't see because they have blinders on. That is
10 what a good defense counsel does. Well, that only helps if you get
11 it in a timely manner, not on the eve of trial. And, it appears now
12 that because of, you know, not having the ability to get this
13 discovery mainly because the government has viewed *Brady* as game
14 changing, we are going to eventually get the *Brady* materials but we
15 are going to get them on eve of trial, probably. And, even now, at
16 this late date they are fighting the Department of State itself. Or,
17 they are saying, "Well, you know, your definition of investigation is
18 different from ours. You say any file related to, you know, ONCIX,
19 or DIA and any forensic result or investigation; well we don't read
20 into that a damage assessment, certainly not. That is not an
21 investigation. That is not a related file to this case." So, yeah,
22 we are going to have to do a motion to compel that discovery. And,
23 eventually if we get that at the very eve of trial, then we are going

1 have to quickly try to incorporate that into our defense strategy,
2 tactics and techniques and what we are going to do.

3 Well, that is problematic, so that is where you see the
4 scope of the government's failure in this case. And, it is
5 problematic and it is particularly disheartening because having done
6 military practice for you know, the last 14 years, and having done
7 state and federal work, there is a big difference. We have open
8 discovery. We do not hide the ball. You get everything up front and
9 you have a trial on the facts, on the evidence, no gamesmanship. No
10 holding things back. I point out something that I referenced within
11 my motion, the *Cabridi* case, and I think sadly, the *Cabridi* case
12 captures what has happened in this case. In there the court said,
13 "It is sufficient to say here there are two things that are obvious
14 to the court from both its review of the government's filings as well
15 as its own independent review of all the documents and evidence
16 presented in this case. First, the prosecution early on in the case
17 developed and became invested in a view of the case and the
18 defendant's culpability and roll as to the terrorism charges and then
19 simply ignored or avoided any evidence or information which
20 contradicted or undermined that view. In doing so, the prosecution
21 abandoned any objectivity or impartiality that any professional
22 prosecutor must bring to his work. The prosecution's understandable
23 sense of mission and its zeal to obtain a conviction overcame not

1 only its professional judgment but its broader obligations to the
2 justice system and the rule of law." And, I think virtually the same
3 thing can be said in this case. Prosecutors have consistently, in an
4 effort basically to get their guy, have viewed and interpreted
5 discovery in a very narrow fashion. I mean, take a look at what they
6 have done. Without really any case law they have said 701 does not
7 apply to classified discovery. And yet, now the Court said, "It
8 does, you need to invoke a privilege." And then they said to the
9 court, "You know what, Court, we were just waiting for you, we were
10 just waiting for you to show up in order to, you know, control how we
11 provide classified discovery." But they did not invoke M.R.E. 505.
12 They were not waiting in the wings on referral to say, "Hey, we are
13 invoking the privilege or we are asking for a limited disclosure."
14 These issues came up not because of them but because of the defense
15 seeking a motion to compel discovery. And now, even at this late
16 date, they still have to coordinate with the OCAs to determine who is
17 going to invoke a privilege, who wants limited disclosure, we need
18 more time in order to do that. That is not the government that was
19 waiting in the wings just for the court to show up after referral in
20 order to control classified discovery. And now, they are reading
21 into, and even apparently at the behest of the Department of State,
22 trying to argue that somehow partial unfinished, maybe not totally
23 complete, damage assessments don't fall within *Brady*, that is going

1 to be their position. Again, every step of the way, trying to
2 interpret rules in the most narrow fashion in order to prevent the
3 defense from having access to key discovery. That is the nature of
4 the discovery violations. And for these reasons, and the reasons
5 cited within the defense's motion, we request this court to dismiss
6 all charges with prejudice. Thank you.

7 MJ: Thank you.

8 Major Fein?

9 TC[MAJ FEIN]: May I have a moment, Your Honor?

10 MJ: Yes.

11 TC[MAJ FEIN]: Your Honor, since before referral, the
12 prosecution has understood its *Brady* obligations under 701(a)(6) and
13 *Brady* itself, including *Williams*, its requirements under R.C.M.
14 701(a)(2) and this is mostly evidenced by our view of the case. And,
15 that could be found in what Ms. Williams will hand to you now, it is
16 Appellate Exhibit 12, Enclosure 3, which is an example of one of the
17 search and preservation requests that the prosecution sent out. This
18 is one to the Defense Intelligence Agency sent out on June 14, 2011.
19 Just to highlight, Your Honor, from the very beginning of this case
20 once information was determined to be an organization that is closely
21 aligned under *Williams*, the prosecution immediately submitted one of
22 these request to those organizations. The list has been previously
23 provided to the defense and to the court. And just to highlight in

1 the very first paragraph, "Dear senior official, this is a twofold
2 request. First is to conduct a thorough and comprehensive search of
3 your records and information," and it is not to search just for
4 information related to a very small population of documents or
5 information that the prosecution feels is discoverable, it is for all
6 information, all information pertaining to Private First Class
7 Manning and/or WikiLeaks; the entire population. The intent, of
8 course, as you have read the entire document, is for the prosecution-
9 ---

10 MJ: Do I have that memo? I have computer logs.

11 TC[MAJ FEIN]: No, I am sorry Your Honor. You have the wrong
12 exhibit, it is----

13 [The trial counsel approached the Military Judge and indicated the
14 proper document.]

15 MJ: Thank you.

16 TC[MAJ FEIN]: So, Your Honor, in the first paragraph, the third
17 sentence down, "Conduct a thorough and comprehensive search", bolded,
18 "everything dealing with Private First Class Manning and WikiLeaks."
19 Again, the prosecution's view of the case from the beginning was to
20 be over-inclusive, to get all of this material and start reviewing it
21 for Brady, Giglio material, Jencks material, not just 701(a)(6) or
22 701(a)(2), if submitted, a specific request for information within
23 the possession of military authorities. Continuing in this document,

1 as you will see, Your Honor, are certain search criteria to help the
2 agencies do this search; different personally identifying information
3 of Private First Class Manning and different terms associated with
4 WikiLeaks. And finally, just to ensure that there is no issues of
5 interpretation, the prosecution also included, bolded, in the second
6 paragraph on the second page the following, "to provide this
7 information, provided above, and also for any information directly
8 concerning Private First Class Manning including, but not limited to,
9 any documents that discuss damage or harm caused by Private First
10 Class Manning and WikiLeaks and any measures considered or taken in
11 response to the activities of PFC Manning and WikiLeaks." And the
12 date timeframe was from November 1, 2009 to present, not even
13 stopping at the end of the charged misconduct. Again, the original
14 view of this case as it has continued through today--evidence
15 hearing. The last part of this, Your Honor, was the preservation
16 requests. An affirmative obligation that the prosecution instituted,
17 not based on any defense request, for the different government
18 entities to preserve the evidence that they are going to produce for
19 the prosecution to review. And since we received these returns, and
20 some of them are so ongoing, the prosecution has endeavored to
21 process them, review them, mark any material that was *Brady* or
22 701(a)(6), *Brady* material, mark it and then request that information,
23 the authority to produce it to the defense.

1 MJ: How do you view R.C.M. 701(a)(2)? Or, how did that rule
2 play in this process?

3 TC[MAJ FEIN]: Well ma'am, first and foremost, we wanted to get
4 the evidence preserved and the evidence before our eyes either at the
5 different entities or a copy locally as this memo will show. Some
6 did it, some did not. Once the defense submits a specific request
7 that would fall under 701(a)(2), in the possession, custody or
8 control of military authorities, and then we would review that
9 material for precisely that. And then if we find it, make it
10 available for inspection. The only material we didn't make
11 available, and by, "make available", turn over in discovery, was the
12 classified material we litigated in the previous motions hearing
13 during the adversarial process. And again, that was for classified
14 information that we would have to have approval to turn over. So
15 again, Your Honor, if it is within military authorities and a
16 specific request the defense, then the prosecution would argue that
17 the burden is on--affirmative burden is all of the material, that is
18 subject to the request is discoverable and then we would have to go
19 through and figure out what does not fall within their request or
20 not.

21 MJ: Well, what is the government's position with respect to--I
22 understand your view that 701(a)(2) applies to evidence in the
23 possession, custody and control of military authorities. The defense

1 gave the court, with respect to the last motion to compel grand jury
2 testimony, a number of federal cases interpreting Rule 16 where other
3 agencies are aligned with the prosecution and the prosecution has
4 gone to the other agencies and reviewed the documents, federal case
5 law, not grand jury material, but federal case law has viewed
6 documents in such a fashion as within the custody and control of
7 government and, I understand that "the government" is what is used in
8 Rule 16, "military authorities" is what is used in 701(a)(2). What
9 has the government's position been with evidence that could
10 potentially be material to the preparation of the defense but is in
11 control of another agency?

12 TC[MAJ FEIN]: Your Honor, that it does not fall under 701(a)(2)
13 and it would fall under 701(a)(6) in the *Williams* analysis. So, if
14 it is a specific--I mean, the analogous would be a specific request,
15 assuming is not a closely aligned organization, or--because if it is
16 that it is even easier, or if it is a law enforcement investigation,
17 but if it is in that third prong, specific request, which would be
18 analogous to a 701(a)(2) specific request, if the defense submitted
19 it, it is not within the possession of military--or control of
20 military authorities. Then, we are reviewing it for a minimum,
21 again, for a minimum standard of 701(a)(6), *Brady*. It does not
22 necessarily mean that the government doesn't--can't turn over
23 additional information which we have done throughout the entire life

1 of this case. Because, at the end of all of this, it really boils
2 down to damage assessments which keep getting re-litigated, Your
3 Honor. The defense ultimately wants damage assessments and the
4 government has never said that *Brady* does not apply to sentencing
5 evidence or *Brady* does not apply to classified information, it is how
6 we manage that in the adversarial process that is controlled under
7 the rules. But, if it is *Brady* material, it is constitutionally
8 protected. Even if we invoke the privilege, the government
9 recognizes, that that still might not be able to adequately protect
10 that classified information that could come from, for instance, the
11 damage assessments. And, at that point, under the rule invoking the
12 classified information privilege, it is up to the Military Judge to
13 make a decision whether the defense gets it or not. If not, then
14 there is the sanctions involved if the government makes the ultimate
15 determination to not turn it over to protect it. But, ultimately,
16 Your Honor, again, the prosecution sought this information, as broad
17 as it can be, everything dealing with Private First Class Manning and
18 WikiLeaks. We have been, and continue to, review the information and
19 we are reviewing it under the different standards based off of,
20 ultimately five standards, Your Honor is what it would boil down to.
21 We have our first 701(a)(2) is in play, if it is within the
22 possession of military authorities and the defense has submitted a
23 specific request. The next three are the 701(a)(6) *Williams* factors,

1 joint or closely aligned law-enforcement investigations, so that
2 would be: Army CID although that is also in the possession of
3 military authorities; FBI and Department of diplomatic services, DSS;
4 then you get to the third category, the third is those that are--
5 those organizations within the federal government that are closely
6 aligned, although it does not just apply to the federal government,
7 that is all that is at play currently in this case.

8 So, as we have outlined in multiple filings, and most
9 recently in the grand jury response, here are the organizations that
10 we have determined were closely aligned to us based either off
11 charged documents, use of evidence or other information involved.
12 And then finally, specific requests by the defense outside of
13 military authorities. So, those are the first four. The prosecution
14 has also maintained from the very first time we have met in
15 conference about *Brady* obligations that there is a fifth category and
16 there would be those that have information that we have an ethical
17 duty to also search for. If the defense has not submitted a request,
18 the organization is not closely aligned or a law enforcement
19 organization but we still have some--a good-faith basis that
20 information may exist, we still have an ethical obligation to go
21 search that. All of this has been occurring since well before
22 referral of this case. And, what seems to be confusing here is that
23 the defense is alleging just because information hasn't been turned

1 over that we must be suppressing or withholding it. But, the only
2 information we are required to turn over outside of 701(a)(2), that
3 we are currently litigating, is information that falls under *Brady*.
4 And, the government has never maintained that it only searched for
5 game changing material, it is material that squarely falls within
6 701(a)(6) and *Brady*. Unfortunately, because damage assessments have
7 been the key that--the key piece of information that has been
8 litigated, the prosecution has focused on that that is not sentence
9 reducing. Therefore, unless it is, the information is not
10 discoverable unless----

11 MJ: Captain Fein, is the government intending on introducing
12 aggravation evidence in sentencing on damage to the United States in
13 this case?

14 TC[MAJ FEIN]: Yes, ma'am.

15 MJ: So, are you telling me that that material is not in--that
16 that is not material--or, evidence that is material to the
17 preparation of the defense?

18 TC[MAJ FEIN]: Your Honor, if the government is using certain
19 aggravation evidence, it absolutely is material to the preparation of
20 the defense. We are just maintaining that all aggravation evidence
21 is not material to the preparation of the defense. The entire
22 population of aggravation, there is some aggravation that the
23 government--the prosecution will receive authority to use because of

1 its sensitivity, being classified, in the aggravation case, but not
2 all of the evidence, Your Honor. So, the government maintains that
3 all mitigation evidence is discoverable under *Brady* but not all
4 aggravation evidence and that is why the rules are very clear to
5 define----

6 MJ: I understand that under *Brady*, again I am going back to my
7 701(a)(2).

8 TC[MAJ FEIN]: Yes, ma'am.

9 MJ: If there is evidence that is material to the preparation of
10 the defense from another agency, what is the government's position?

11 TC[MAJ FEIN]: Your Honor, that 701(a)(2) does not apply unless
12 it is in the possession, custody or control of the actual Army or the
13 Department of Defense or prosecution.

14 MJ: But, R.C.M. 703(f) would, if it is relevant and necessary.

15 TC[MAJ FEIN]: Yes, ma'am.

16 MJ: Proceed.

17 TC[MAJ FEIN]: So again, just to highlight, Your Honor, the
18 prosecution never maintained that *Brady* does not apply to sentencing.
19 The only *Brady* material we have found thus far is sentencing *Brady*
20 material that we have ultimately been litigating. Otherwise, we have
21 turned over the remaining information. We have found no purely
22 exculpatory information, although the prosecution recognizes that
23 *Brady* does not stand just for pure exculpatory information, there is

1 impeachment evidence and the entire progeny. But again, the focus
2 has been, so far, in this court-martial, pretrial process, has really
3 been focused on damage assessments.

4 Your Honor, the defense ultimately argues dismissal of
5 charges with prejudice. The United States has provided unclass
6 material because that is--because the prosecution has been working to
7 receive the approvals to turn over this information and we
8 immediately received approval once we received the unclassified
9 damage assessments once we assessed them to be potential Brady
10 material, and then we worked to get that approval, and that took
11 about three weeks. Once we received, we turned it over. What the
12 defense also seems to confuse is the timing. Although this request
13 that the prosecution has submitted for your review, the DIA example
14 Appellate Exhibit 12, enclosure 3, is dated 14 June and has a
15 suspense of later that summer does not necessarily mean those
16 agencies met that suspense. I assume this would be litigated
17 probably in the speedy trial motion. But, it does take time to do
18 these broad searches within the agencies and then for the prosecution
19 to review. So, just because a conclusion might have been met by some
20 federal government[sic] in 2010 based off of the defense's e-mails on
21 Saturday and what was alleged today on proffer, it does not
22 necessarily mean that the prosecution has had this in our files since
23 December 2010 and are just not turning over. Once we receive

1 information that is discoverable we immediately work to process to
2 get the approvals to turn the information over. And, typically,
3 unless it is classified, that is a very fast process.

4 MJ: Is the government arguing to me--I am looking again at your
5 response, back on the 8th of March to the defense motion to compel
6 discovery. It's got a paragraph in here saying that R.C.M. 701 does
7 not govern the production of classified--or, R.C.M. 703 doesn't
8 govern the production of classified information, see R.C.M. 701(f),
9 "nothing in the rules shall require disclosure of information
10 protected from disclosure by M.R.E. 505". There does seem to me to
11 be a disconnect on what the government's understanding of the
12 discovery rules was in their response versus the government's
13 understanding of the discovery rules was after the court ruled. Was
14 there a change?

15 TC[MAJ FEIN]: There was a slight change Your Honor and that was
16 simply evidence today under what rule do we intend to submit the
17 Department of State damage assessment, and that is under 701(g)(2).
18 But, the change, based off of the court's ruling after the
19 adversarial process occurred, was that the government still maintains
20 that it is classified information and that we have to protect it in
21 505 is there, but what was changed is if there is classified
22 information subject to a specific request, that we either have to
23 move for a 505(g)(2) review *in camera* or invoke the privilege, or

1 what we have been doing which is turn it over to the defense without
2 getting the court involved. So, in that one area, yes, Your Honor,
3 there is a change based off the court's ruling.

4 But that--to highlight the issue for this motion to
5 dismiss, especially when it comes to prejudice, that ruling did not,
6 and there is no facts presented, prejudice the accused at all.
7 Because all of the material going to be served has been reviewed by
8 the prosecution under, at a minimum, the *Brady* standard in 701(a)(6)
9 and is still available depending on the court's rulings as we
10 litigate these issues under 701(a)(2). But, even evidence today on
11 the grand jury portion of today's motion hearing, the defense is
12 articulating a somewhat novel legal argument on a definition of the
13 rule. So, if the defense is proposing that 701(a)(2) should apply
14 much broader than it traditionally does in the system that we favor,
15 open file discovery, then the prosecution should have the opportunity
16 to counter argue and then we will leave it up to the arbiter to make
17 the decision. And that is what is absolutely occurring at this
18 point. So, based off the court's ruling, then the prosecution could
19 go back, look at the 701(a)(2) material and then start producing,
20 pursuant to a court's order. We are just not at that point in this
21 court-martial yet. We might be, starting tomorrow morning.

22 Continuing, lost evidence----

23 MJ: Well, that actually triggers a question for me.

1 TC[MAJ FEIN]: Yes, ma'am.

2 MJ: In your review of these materials from other agencies, has
3 the government found material that might be--or evidence that might
4 be material to the preparation of the defense?

5 TC[MAJ FEIN]: Yes, Your Honor. I think, just without
6 consulting with my fellow counsel, if you need a clear answer across
7 the entire spectrum. But I could say at least, yes, in certain law
8 enforcement files, most likely in the FBI files we have. But, to
9 note on the record, the minimum standard is 701(a)(6) and *Brady*.
10 But, it does not necessarily mean, as we told the defense even prior
11 to referral in all of our pre-referral discovery responses, that we
12 are still--we are only producing, at a minimum--excuse me, we are
13 producing above and beyond the minimum standard, the minimum standard
14 being *Brady*. So, even if there is information that is material to
15 the preparation of the defense, it should be turned over and if not,
16 we still have it available to review based off of your rulings.

17 So, Your Honor, now moving to the prejudice argument. And,
18 it seems like the only evidence the prosecution [sic] has proffered
19 that might exist on there being actual prejudice is lost evidence.
20 The government has submitted the enclosure for your review of what
21 the prosecution has done to preserve documentary and other
22 information-type evidence. And then to specifically speak to the
23 forensic hard drives, there seems to be a fundamental

1 misunderstanding about what the memo said and what has occurred
2 timing-wise. The prosecution also submits to your review right now,
3 the court reporter has Appellate Exhibit 16, enclosure 24. This is
4 the actual memorandum from the Special Agent in Charge--acting
5 Special Agent in Charge of the CID investigation. This is the
6 preservation request that defense just spoke about. And if I could
7 please direct your attention first to top right, Your Honor, it is
8 dated 30 September 2010. And then, in the third paragraph, it
9 states, "Should your staff identify any additional hard drives,
10 classified or unclassified, used during the deployment to Iraq, I am
11 informing you that the items represent potential evidence and must be
12 preserved as such. Please inform me immediately should additional
13 hard drives be found." So, the key to this, Your Honor, this
14 preservation request dated 30 September 2010, is because immediately
15 before this, CID was up, and we litigated this in the last motions
16 hearing, was reviewing all of the computers and hard drives that
17 redeployed from Iraq in late August/early September. There was a
18 CONEX, if you remember, we spoke about this on the record. They
19 opened the CONEX, CID went in, this is in the AIRs that we can also
20 provide and the defense has, had in their possession; went in,
21 inventoried all of the hard drives and computers. They searched for
22 what they deemed as investigative material. So, they looked for
23 Bradley.Manning's profile on all the computers. If they found them,

1 they took them. If not, they considered their search complete. From
2 that point forward, CID submitted this memo, a preservation request.
3 Other key dates: the unit redeployed from Iraq at the end of
4 July/early August from their last combat tour in Iraq. When they
5 redeployed, all of their hard drives were in this CONEX. CID, as I
6 just stated, searched them and then did a preservation request for
7 any additional ones. The defense submitted to the prosecution in
8 September 2011 their preservation request. That is one year after
9 CID said, "Any additional drives" and there were no additional drives
10 between CID's memo and the defense's preservation request. The
11 government immediately reacted to the defense's preservation request;
12 sent it to ARCENT for those units downrange; sent it to the FBI, CID
13 and sent it to 2/10 Mountain. And then once this litigation
14 occurred, all of those drives were preserved, 181 drives, and then
15 CID went and collected the ones that were identified as being in the
16 TOC or SCIF. So, there is no evidence, Your Honor, the government
17 proffers no evidence before the court that there has been any
18 evidence or any material that has been preserved in this case,
19 properly preserved, that has been lost. It is all present. The
20 prosecution anticipated that there might be prolonged litigation in
21 this case which is why over--almost a year ago the request to
22 preserve their records went out, similar to civil litigation cases,
23 not common in military courts-martial. And, that evidence has been

1 preserved and is preserved. And, the prosecution proffers today that
2 we have received no indication from any of the organizations we
3 submitted these requests to that any of their information is not
4 preserved. In fact, it is--a lot of that we have gone through and a
5 lot of it is waiting for us to go through. Finally, Your Honor, to
6 answer a question you asked the defense about whether a *Brady*
7 violation has occurred, the defense--the prosecution ultimately
8 argues it has not occurred. That we are still pretrial, or as the
9 defense has said, we are pre-pretrial, in discovery phase not even
10 the production phase under 703. So, even if there is a perceived
11 potential for misinterpretation of *Brady* material that still has to
12 be gone through, there are still plenty of time and resources to do
13 that.

14 So, subject to your questions Your Honor?

15 MJ: I do have one more. Prior to the court's ruling with
16 respect to *Brady* information material to punishment, what was the
17 government's view?

18 TC[MAJ FEIN]: Your Honor, the government's position has always
19 been that any information that tends to reduce punishment, mitigation
20 evidence, is discoverable.

21 MJ: Then why were you citing *Cone v. Bell* to me in the
22 response?

23 TC[MAJ FEIN]: May I have a moment, ma'am?

1 [Pause]

2 MJ: Page 5. Actually, page 6 would be the relevant portion.

3 TC[MAJ FEIN]: I am sorry, for which motion?

4 MJ: Well, I guess where I am looking at this is, how is the
5 government interpreting *Brady* in light of M.R.E. 505(f) and (i)?

6 TC[MAJ FEIN]: Yes, ma'am. Under M.R.E. 505(f) and (i), that if
7 there is material that the defense--excuse me, the prosecution finds,
8 so assuming for argument's sake, that the prosecution finds
9 classified material that is mitigating and we identify it as *Brady*
10 material, then that information we either have to, because it is
11 classified, seek approval to turn it over to the defense. If that
12 approval is obtained we would argue 505(g)(2) or 505(f), because the
13 Convening Authority, we are acting on his or her behalf, or (i) is
14 not involved because we are doing it voluntarily under 505(g)(1), we
15 turn it over to the defense; no issue. If the OCA requires us,
16 because of the sensitive nature, to turn over an alternative version,
17 then we would be seeking, most likely, a limited disclosure under
18 505(g)(2). If the OCA, original classification authority, makes a
19 decision that the information is so sensitive that privilege must be
20 invoked then we would be submitting it to you under 505(i). But, the
21 court's analysis under 505(i) would take into account whether it is
22 *Brady* material or not and the court would ultimately make that
23 decision in the *in camera* proceeding and of course that would be

1 using standard of 505(i)(4)(B). So, if it is sentencing material
2 then the prosecution would have to work to obtain an unclass version,
3 but assuming it is so sensitive, there probably wouldn't be an
4 unclass version. So, it would be a version that should at least
5 represent the material adequately enough to turn over to the defense.
6 And, it is ultimately up to the court to make that decision. If the
7 court decides, "No, this material does not adequately represent--this
8 alternative does not adequately represent the *Brady* material that you
9 designated as constitutionally protected piece of information."
10 Then, as per the rules, the prosecution must go back to the OCA and
11 say, "We either have to turn it over or face sanctions." And, the
12 OCA makes that decision at that point. And then, the prosecution
13 comes back and then we are before the Court on this issue.

14 MJ: All right. The Court just notes for the record, it is
15 interesting if you look at M.R.E. 505(f) which talks about relevant
16 and necessary to an element of an offense or legally cognizable
17 defense, it does not mention sentencing at all where M.R.E. 505(i)
18 does.

19 Did that cause any confusion for the government?

20 TC[MAJ FEIN]: No, ma'am, because, also in the standard under
21 505(i) it also says, "And it is otherwise admissible as evidence."
22 So, it also contemplates this higher standard which is another reason
23 to go back, that our guiding light has always been, you know,

1 "relevant and necessary", if it is classified information. That way,
2 it would meet all of these standards, but the idea being if it is
3 classified, we get the approval to turn it over. That way we just
4 keep moving information as much as possible to mirror open file
5 discovery to the best of our ability.

6 MJ: All right, that just triggered one more question:
7 "relevant and necessary", and *Brady*. What is that--and classified
8 information. What is the government's view with respect to the
9 interrelationship of all three of those?

10 TC[MAJ FEIN]: First and foremost, ma'am, for *Brady* and
11 classified information, I think I just spoke on that, which is if it
12 is *Brady* material, it is immaterial to be relevant--to the "relevant
13 or necessary" standard initially because if it is *Brady*, it is
14 constitutionally protected. If the privilege, or if we are using
15 505(g)(2) or 505(c), the privilege, therefore 701(a)(6) would not
16 apply. So then, we fall back to *Brady* still applies as a
17 constitutionally protected right--due process right, it still
18 applies. So, there would be the balancing test ultimately by the
19 court, on whether "relevant and necessary and otherwise admissible"
20 applies or whether it is not good enough. And, that authority comes
21 in under 505, Your Honor. If I may have a moment. [Pause] Your
22 Honor, excuse me, ultimately that comes in the sanctions portion
23 under 505(i)(4)(E) and if you look at the very last part of the first

1 sentence, it says, "The military judge shall issue any order that the
2 interest of justice requires." And, the government would argue that
3 if the relevant and necessary and otherwise admissible standard under
4 that same provision is not adequate enough to have to produce the
5 *Brady* material that the court then would order, "Under the interest
6 of justice, that the *Brady* obligation under the Constitution trumps
7 the rest of the rule and interest of justice applies and therefore,
8 you must turn it over or face the following sanctions."

9 MJ: Thank you.

10 TC[MAJ FEIN]: Yes, ma'am.

11 MJ: Mr. Coombs, do you care to reply?

12 CDC[MR. COOMBS]: Yes, Your Honor.

13 Your Honor, first of all with regards to the government's
14 position now, the court was correct in asking how do they reconcile
15 their motion response with what they are saying now after the ruling.
16 The government has engaged in a little bit of revisionist history on
17 its position with regards to whether or not 701 applies, the correct
18 standard, whether or not is just *Brady* for the merits or *Brady* for
19 sentencing. You know, it is clear that the government has gotten the
20 court's ruling and now understands, "Okay, we need to invoke a
21 privilege." But, when you take a look at every step of the way, the
22 government has clearly indicated that it did not understand
23 701(a)(2). It did not understand 701(a)(6). And it did not

1 understand how M.R.E. 505 works. They were not ready to do anything
2 after referral of trial. Instead, they were just of the position
3 that it is classified, it is not going to apply or be discoverable
4 under typical R.C.M. 701 rulings. That was their position. They
5 talk a lot about, you know, plain language or plain meaning of what
6 you read in a rule, but the plain meaning of their motion cannot be
7 mistaken. They clearly believed 701 had no applicability to
8 classified information. There is no shadow of a doubt with regards
9 to that. With regards to whether or not *Brady* applied to sentencing,
10 the court correctly asked the question, you know, "Why did you cite
11 this rule?" And they really give an answer to that. We got
12 sidetracked on another issue, but they cited *Cone v. Bell* for a
13 reason. And they stated the proper aspect of materiality is for
14 findings for a reason. And, that was because they did not believe
15 sentencing would apply when it comes to classified information. So,
16 again, it is nice that they can change their position and it can
17 evolve over time, especially with the benefit of a court ruling, but
18 there is no mistaking what Captain [sic] Fein put in his motion
19 response to the defense's motion to dismiss and there is no mistaking
20 his e-mail. And, what he indicated was the government's
21 understanding. The government points to the DIA memorandum dated 14
22 June 2011. Again, 14 June 2011 is when they were first asking for
23 these agencies to preserve the information but when you look through

1 that, it clearly indicates that this is not information that is
2 necessarily for discovery as far as to be released to the defense,
3 they are asking for them to preserve this information and to take a
4 look to see what harm might happen for the benefit of the government.
5 The defense looks at that memorandum and they do not see anything in
6 there indicating, "oh, we want to abide by our *Brady* obligations. We
7 want to meet the standards under 701(a)(2) or 701(a)(6)." That is
8 not in any of these preservation requests. These preservation
9 requests are for the government's benefit to find evidence that is
10 beneficial that relates to damage. So, when you look through that,
11 nothing in there indicates that this stuff is going to be preserved
12 for discovery to the defense. With regards to their understanding
13 under 701(a)(2) they again tell the court that, "Yeah, you know, if
14 it is not within our possession as far as a military agency, it does
15 not fall within 701(a)(2)." That is their position. So, what is the
16 harm there? Well, now they are going to say, "You only get *Brady*, if
17 at all", depending upon their position. You do not get the document
18 that would be material to the preparation of the defense. So, that
19 is what we do not get if the government's interpretation is correct.
20 And, it can't be correct for the reasons we argue with regards to the
21 request for the grand jury information. The government can't have
22 full benefit of the Department of Justice, the FBI, other agencies
23 unrelated to the military; have the full benefit of getting

1 information that the court says, "Do you intend to use in
2 aggravation", "Yeah, we do." You can't have the full benefit of that
3 and then say these agencies are not closely aligned for purposes of
4 being within the military's custody, possession and control under
5 701(a)(2). That just can't be.

6 MJ: Well, I mean, that is what I am wrestling with quite
7 frankly, Mr. Coombs, is there is no military case law interpreting
8 R.C.M. 701(a)(2), "in military control". Now, assume it says, in
9 plain reading, exactly what it means, "under military control".
10 Then, what is the defense's suggestion, assuming the same question I
11 asked the government, in the search of the government files for Brady
12 the government finds material that is--or, evidence that is material
13 to the preparation of the defense in another agency.

14 What should happen?

15 CDC[MR. COOMBS]: Okay. With regards to just looking at the
16 discussion to R.C.M. 701(a)(2), it is clear, and then when you just
17 doing a comparison as I stated earlier with the federal Rule 16, they
18 are identical to the comma. And to interpret----

19 MJ: Except for, "government" versus "military authority".

20 CDC[MR. COOMBS]: Exactly. And then it is clear though within
21 the discussion, and I will actually read that section. It is
22 supposed to be more expansive. 701(a)(2) is not less expansive than
23 Rule 16, it is more expansive. So, I am on Appendix 21-33, ma'am.

1 MJ: Okay.

2 CDC[MR. COOMBS]: If you look at, the top right-hand corner,
3 "This subsection is based in part on federal rule--Criminal
4 Procedural Rule 16a, but it provides for additional matters to be
5 provided to the defense." So, the additional matters, and when you
6 read down within the trial counsel's possession, you see Federal Rule
7 Of Criminal Procedure 16 says, "government", it does not say US
8 attorney, but it is clear when you said, "government", you mean US
9 attorney. When R.C.M. 701(a)(2) says military, they definitely mean
10 trial counsel but also within military authorities to be more
11 expansive, to provide more information not just within the possession
12 of the trial counsel but any other military authority. The rule when
13 you look at that then and compare it with, again, unfortunately not
14 all the time do we consider--have a good appellate case law on all of
15 the issues within the military practice, but frequently we look to
16 federal practice when there is a void. And, in this instance when
17 you know that Rule 701(a)(2) was premised on Rule 16, and you see in
18 Rule 16 where, yes, if the agency is a joint--is a participant in a
19 joint investigation or if it is closely aligned then those documents
20 are within the possession, custody or control of the US attorney, the
21 government counsel. There is no reason to not interpret 701(a)(2) in
22 the same light. And in fact, as I stated earlier, to interpret it
23 differently would result in the absurd situation of where an accused

1 in the military would fare much worse than an accused in federal
2 system and the government would have every incentive at that point,
3 if that were the way 701(a)(2) were interpreted, to involve outside
4 agencies in investigation. Let the outside agency take the lead,
5 CID, stand down. Let the FBI investigate this fully because if that
6 is the case we get the full benefit of FBI investigation without any
7 of the negative of having turn over that investigation to the defense
8 as we would with the CID investigation. That just cannot be the
9 result. It can't be the result because when you look at federal case
10 law is clear that is not how Rule 16 is interpreted. In this
11 instance, the defense would submit that the court should look at
12 federal case law to enlighten it on how 701(a)(2) should be
13 interpreted in this unique circumstance. Then, if it is within the
14 military's possession custody or control, the onus should be,
15 "Government, produce it." And at that point, if it is the way that
16 the defense believes, all it takes is the government to say, "Hey, we
17 need this information." And, they might even have it in their
18 possession custody or control within short order, and then they turn
19 it over. If the agency says, "No, we are not turning over to you. I
20 know we let you look at the stuff whenever you wanted to but now that
21 we understand that you are going to hand it over to the defense, we
22 are not going to give it to you." Then unfortunately, yes, we have
23 to fall within R.C.M. 703 to get it. But, that is a factual issue,

1 that is not a legal issue. And so, factually it may not be in the
2 file cabinet of the trial counsel but legally it is. And so, we
3 would say that 701(a)(2) says that this is stuff that we should be
4 able to discover. Now, the court asked about with regardance[sic] to
5 classified information, what standard applies, and the government
6 gave a, "Well, it is, you know, 505(i) but then if you do not hand it
7 over, it is federal *Brady* and that is the interpretation. And then
8 if that does not apply, you would then perhaps use the sanctions if
9 you thought justice required it to hand over." The defense would
10 direct the court to *Lonetree* 31 MJ 849. *Lonetree* talks about
11 classified discovery that----

12 MJ: 31 MJ?

13 CDC[MR. COOMBS]: I am sorry, ma'am, and 31 MJ 849. And in
14 *Lonetree* to talk about the appropriate standard. And they said the
15 standard of relevant and necessary, at least within M.R.E. 505, when
16 you are talking about information that is either specifically
17 requested or information is *Brady*, cannot be the relevant and
18 necessary standard under the 703 standard. It is lower than that.
19 And, it goes back to material that is preparation--that is favorable
20 to the defense--or, excuse me, material that is needed for the
21 preparation of the defense or information that is favorable to the
22 accused in that it tends to reduce guilt, mitigate guilt or reduce
23 punishment. So, it talks about how the standard has to be similar to

1 the 701 standard. Again, even though we are dealing with 505, it's
2 not the 703 standard. So even in this light, once you look at
3 *Lonetree*, you will see that that is the, in fact, appropriate
4 standard.

5 MJ: And, will the defense be providing the court with a copy of
6 *Lonetree*?

7 CDC[MR. COOMBS]: I will happily do so, ma'am. Not a problem.
8 Again, when you take a look at the government's actions pre-court
9 order--of the court ruling and post court ruling, they stand in stark
10 contrast of each other. And, the court has the benefit of seeing
11 their motion, hearing their oral argument, initially for the motion
12 to compel discovery and then now being able to see what they say here
13 today. And it is clear that the government is slowly coming around
14 to its discovery obligations. It is not leading the way in
15 determining what its discovery obligations are. And, if it were, and
16 it did, in fact, have the understanding that today tries to profess
17 that it did, then we would be in a much different situation because
18 right after referral, they would have indicated for the court with
19 regards to this classified discovery. We could provide this any time
20 we want, we do not have to go to the 505. And, they provided
21 classified discovery to the defense prior to referral. So, they
22 could provide anything they voluntarily wanted to. But, with regards
23 to the small subset of classified discovery, either we want to

1 provide a limited disclosure or we are invoking the privilege based
2 upon the OCA invoking it. They would have been prepared to do that
3 at that moment, not still today, not being prepared to do that. And
4 then, at that point, then the court would take the issue under either
5 505(g)(1) or because they have invoked a privilege, then court would
6 consider whether or not that information is needed for the defense to
7 have in order to have a fair trial. And if they did not produce it,
8 then we'd go to sanctions. But, the key thing there is--and, the
9 proof is in the pudding here, if they really truly understand
10 discovery, they would have been ready to do that at that moment, but
11 they are not even ready to do that today. And that is because they
12 are just now catching up with their discovery obligations.

13 With regards to the damage from their discovery violations,
14 again, going back to what they were looking for, what we know they
15 were looking for, for *Brady* and what actually is something that *Brady*
16 applies to. The government wants to say, "Hey, from now on, hey, we
17 have got the stuff. If ordered to look at it this way, we can look
18 at it quickly. We already have it." That again goes back to the
19 problems that the defense highlighted. The government has every
20 incentive to do a very quick review, a very cursory review. They do
21 not have the incentive to find *Brady* violations on their searches
22 because if they do, that just underscores the gravity of their
23 initial mistake in this instance.

1 MJ: You do not think they have any kind of interest in ensuring
2 a conviction would be upstanding in the event they got one?

3 CDC[MR. COOMBS]: And that is exactly what the defense would
4 think. You know, and if that were their position, they would not
5 have taken such a creative view of discovery when it comes to
6 classified information. It would have taken a cautionary review of
7 discovery. They had absolutely no case law to support their view
8 that 701 did not apply to discovery if it involved classified
9 information; none. Having taught classified discovery, knowing what
10 I taught to students at the JAG School, that is not how classified
11 discovery is taught. They would understand that 505 does not even
12 apply until you invoke a privilege and yet, they viewed it very
13 narrowly. And they read out of this anything dealing with 701.
14 Again, if you have an interest in ensuring your conviction is upheld
15 on appeal, you do not take that leap of logic. And then today, and
16 we will see this with regards to the Department of State, they are
17 willing to take another leap of logic that, based upon a 44-year-old
18 Supreme Court opinion citing a second concurrence, the one sentence
19 that has been cited a mere 24 times in the 44 years since that date,
20 *Giles*. We are going to say that because it is preliminary, *Brady*
21 doesn't not apply to it. Again, you would think that if the
22 government was interested in ensuring any conviction if they get one,
23 stands up on appeal, they would not hang their hat on a 44-year-old

1 second concurring, one sentence opinion that has been cited a mere 24
2 times since that date. But, that is exactly what they are doing.

3 So again, for all of the reasons cited in the defense's
4 motion, the defense request that the Court dismiss all charges with
5 prejudice.

6 MJ: Thank you.

7 All right, it looks like there are two additional issues we
8 should address today, one being the bill of particulars and the
9 other, I received an e-mail from Mr. Coombs regarding some of the
10 discovery that you did receive with respect to the damage
11 assessments. Do you want to describe that for the record?

12 CDC[MR. COOMBS]: Yes, ma'am.

13 And,----

14 MJ: Well, before we do that, I am looking at a time here, I
15 know it is 20 minutes to 1400. Do the parties want to take a short
16 recess, take a lunch recess, and then come back and handle remaining
17 issues?

18 CDC[MR COOMBS]: The defense would say a lunch recess would
19 be fine.

20 MJ: All right, does the government agree?

21 TC[MAJ FEIN]: We do, Your Honor.

22 MJ: All right, how long would you like?

1 CDC[MR. COOMBS]: An hour, Your Honor. So come back, actually
2 at 1445.

3 MJ: All right, that works. So, is there anything else we need
4 to address before we put the court in recess?

5 CDC[MR. COOMBS]: No, Your Honor.

6 TC[MAJ FEIN]: No, Your Honor.

7 MJ: All right, court is in recess until 1445.

8 **[The Article 39(a) session recessed at 1340, 24 April 2012.]**

9 **[The Article 39(a) session was called to order at 1448, 24 April**
10 **2012.]**

11 MJ: This Article 39(a) session is called to order. Let the
12 record reflect all parties present when the court last recessed are
13 again present in court.

14 All right, we have remaining--why don't we start with
15 issues we have with the State Department. Captain [sic] Fein, what
16 is going on with them?

17 TC[MAJ FEIN]: Ma'am, I assume you are referencing ----

18 MJ: Major Fein, I am sorry, excuse me.

19 TC[MAJ FEIN]: That is okay, ma'am. I assume you are referring
20 to two different issues, although both relate to the State
21 Department. The first from the government, during a previous 802,
22 telephonic 802 conference, the Court asked the prosecution to
23 coordinate with the State Department to possibly provide witnesses to

1 explain whether a damage assessment, the draft damage assessment,
2 that they possess, what it contains, what information, and to explain
3 Ambassador Kennedy's sworn testimony before Congress on what the
4 Department of State has done pursuant to the leaked material. Based
5 off the defense--excuse me, based off of the Court's, I guess,
6 request, or direction for the prosecution to provide a witness, we
7 coordinated with the State Department and after coordinating with
8 them they said they will comply with the Court's order dated 18 May
9 for the damage assessment to be provided to the Court, at least for
10 an *in camera* review after the prosecution looks for any *Brady* or
11 701(a)(6) material and comply by 18 May. Subsequent to that R.C.M.
12 802 conference we coordinated, and after the e-mail we also sent--we
13 coordinated with the Department of State and the Department of State
14 has asked that the prosecution readdress this issue with the court
15 and they will provide more information to be provided to the court to
16 have an initial determination made on whether that type of
17 information would fall under *Brady*. And so, what the prosecution
18 intends to do is once we receive that information either today or
19 tomorrow, as of this last break we have not received it, a
20 notification to go check our unclassified e-mail. Once we receive
21 it, is to immediately draft a motion and submit it to the court for
22 consideration. But, with all that, Your Honor, it is still with the
23 intent to meet 18 May deadline in regards to the court ruling.

1 MJ: All right, so just to make sure I am understanding this.
2 The Department of State wants me to reconsider my portion of the
3 ruling in the motion to compel discovery with respect to their, I
4 guess, interim, or not yet complete damage assessment.

5 TC[MAJ FEIN]: That is correct, Your Honor.

6 MJ: But, they are going to, at this point, produce it on the
7 18th of May for *in camera* review?

8 TC[MAJ FEIN]: Pursuant to your order, your original order, yes
9 ma'am.

10 MJ: If I don't change my mind.

11 TC[MAJ FEIN]: Correct, ma'am. But, for the reconsideration,
12 they are also going to produce the document for us to submit *ex*
13 *parte, in camera* for you to review it and see on its face how the
14 document should not be considered.

15 MJ: And I believe we discussed this earlier. If they are
16 preparing some kind of pleading or some kind of a motion with
17 authorities for why I should not--why it is not discoverable, that is
18 going to both sides, is that correct?

19 TC[MAJ FEIN]: That is our intent, yes, Your Honor.

20 MJ: Okay.

21 TC[MAJ FEIN]: And, the prosecution will be preparing that
22 document. They are providing a cover letter to be submitted.

1 MJ: Now, is this anticipated to be litigated--is this all
2 going to be ready by Thursday while we are here or is this----

3 TC[MAJ FEIN]: The prosecution's intent is to have it, Your
4 Honor. Unfortunately, because this issue involves some very senior
5 officials at the Department of State it just, unfortunately, takes a
6 while to have this approved and provided to us and that is being
7 worked as of 1930 last night and as of 0730 this morning.

8 MJ: So, what they would be providing me, be it Thursday or
9 whatever, for *in camera* review would be what they would be providing
10 me on the 18th of May; same thing, right?

11 TC[MAJ FEIN]: Yes, Your Honor.

12 MJ: Okay. So----

13 TC[MAJ FEIN]: The only difference--I am sorry, Your Honor.

14 MJ: No, no, that is all right. So, the only concern I would
15 have, if it is going to the next motion session is the 18th of May is
16 before the next motion session.

17 TC[MAJ FEIN]: Yes, ma'am. So, the government would ask that we
18 litigate it as soon as possible, as soon as we get it. And, if not,
19 then possibly either having another session or having you, if the
20 defense agrees, make the decision, I guess, in a 802-like conference
21 and then we would come on the record later.

22 MJ: All right. Well, why don't we revisit this issue on
23 Thursday and see where we are with it.

1 Defense, do you have any input on this issue?

2 CDC[MR. COOMBS]: Yes, Your Honor.

3 The defense would request that in addition to providing the
4 damage assessment or the interim damage assessment that the
5 Department of State has, that the government seek to have some
6 clarification regarding Ambassador Kennedy's statements to Congress
7 on this issue. The defense pointed out various areas in which
8 Ambassador Kennedy indicated that the Department of State immediately
9 took certain steps, the first was to ask the chiefs of mission at
10 effected posts to review the purported State material in their
11 release and provide an assessment as well as a summary of the overall
12 effect the WikiLeaks release would have on relation to that host
13 country. Then, Ambassador Kennedy stated that on November 28th,
14 2010, the State Department took the following action: one, it
15 established a 24/7 WikiLeaks working group composed of senior
16 officials from throughout the Department, notably their regional
17 bureaus. They created a group to review potential risks to
18 individuals and they suspended the SIPRNET access to the net-centric
19 diplomacy, thereby then putting it on to JWICS. Additionally,
20 Ambassador Kennedy stated that the Department of State created a
21 mitigation team to address the policy, legal, security,
22 counterintelligence and information assurance issues presented by the
23 release of these documents. And finally, Ambassador Kennedy stated

1 that twice on two separate occasions, the Department of State
2 convened two separate briefings for the members of both the House of
3 Representatives and the Senate within days of the December 2, 2010
4 first disclosures by WikiLeaks and also appeared twice before the
5 House Permanent Select Committee on Intelligence in order to,
6 presumably, provide briefings regarding the scope of any potential
7 damage, any potential mitigation effort that was ongoing or any harm
8 that came from that. That--those briefings is what supports the
9 Reuters news accounts afterwards quoting, again, people who decided
10 to remain anonymous but were present at these briefings, saying that
11 the State Department felt inclined to exaggerate the harm in order to
12 assist the Department of Justice's efforts to go after WikiLeaks.

13 MJ: Wait a minute, where does that come from?

14 CDC[MR. COOMBS]: That comes from what we--the defense put in
15 its exhibit for the court to consider with regards to the Department
16 of State damage assessments. So, that is the news accounts by
17 Reuters that were quoting individuals that were at the briefings done
18 by the Department of State. So what the defense would request is
19 that either Ambassador Kennedy be produced at a subsequent Article
20 39(a) so that the defense has the ability to cross-examine him as to
21 the scope of what the Department of State has done, or the
22 government, in detail, provide an account for each of these efforts
23 that is Ambassador Kennedy testified to during the congressional

1 hearing, which the defense provided to the court, his statement as to
2 what the Department of State has done due to these leaks and in
3 relation to them. And this may be an opportune time to talk about
4 what is within Appellate Exhibit 43, as an attachment, this is the
5 roughly 12 pages or so of unclassified discovery provided by the
6 government recently regarding requests----

7 MJ: Before we go into this, let us talk about State Department.

8 CDC[MR. COOMBS]: They reference the State Department cables,
9 that is what all of these are referencing, ma'am. So, these are all
10 department of state cables that the various agencies have been asked
11 by either the Office of National Counterintelligence Executive,
12 ONCIX, or by DIA to look at. And, these various agencies have come
13 back, looking at the cables in order to assess what possible damage
14 may have happened and what mitigation efforts are needed by that
15 particular agency.

16 MJ: Hold on just a minute.

17 Major Fein?

18 TC[MAJ FEIN]: Your Honor, the prosecution asks that we do
19 address one issue at a time, understanding that department cables
20 might have been compromised, but clearly as the defense has said, it
21 is one different department or agency asking another department or
22 agency. None of it has to do with the State Department. So, I think
23 there is a lot of confusion going on right now on what information

1 does or does not exist at what entity. The issue right now is the
2 State Department and then we will approach--or take on this issue.

3 CDC[MR. COOMBS]: Is not really confusion, ma'am. It is, this
4 is, and again, the Department of State and if we had a Department of
5 State representative here, that would be helpful because we would be
6 able to show that the Department of State, along with the Department
7 of Defense, DIA, ONCIX, and other agencies collectively work together
8 to assess the damage in this case. And as we look, at least to the
9 documents that we have been provided, what we get is consistently the
10 documents do not contain any statements or descriptions of
11 activities. The documents do not indicate any harm has been done.
12 The documents reference information that has been already publicly
13 acknowledged and widely reported. These are the damage assessments
14 so far that we have received referencing the cables. So, it is clear
15 that when the government says, "We are going to provide to Your
16 Honor, the Department of State damage assessment, the interim
17 report", that report is a robust report based solely, if you just
18 looked at Ambassador Kennedy's testimony, it is not a small set of
19 documents. But, when you consider the fact that it was not just the
20 Department of State, but collectively, and that goes back to who is
21 closely aligned and joint investigation, but collectively, the
22 government, as a whole, has been working to try to find any harm from
23 the cables. And, they worked with both ONCIX, DIA, and other agencies

1 to farm out every one of these cables to any agency that was even
2 referenced remotely and asked them to look at the cable, asked them
3 to tell them whether or not any damage has been done, and whether or
4 not any mitigation effort is needed. At least from the 12 or so
5 pages that you have received there, it is clear that the answer so
6 far is, "No damage, no mitigation effort is needed."

7 MJ: Well, these are documents you receive under *Brady*, right?

8 CDC[MR. COOMBS]: These are documents received last week and I
9 am assuming, yes, under *Brady*. But just last week received. And
10 when you look at the date of this, 26 November 2010, we have asked
11 the government when they received these. The government has
12 indicated that they received these all just a few weeks ago. And,
13 that is the representation to us. So, we have asked, "Why did you
14 receive these so late?" And we have not received any response to
15 that. But, the overarching issue here is any damage assessment that
16 is provided by the Department of State has to be at least responsive
17 to what Ambassador Kennedy testified to as what the Department of
18 State did. And failing that, again, the defense does not get the
19 opportunity to see that because it is provided *ex parte*, but failing
20 that, then the defense would request that the court require a member
21 from the Department of State to come here so we can cross examine
22 them as to the steps that they took and whether or not whatever
23 report is ultimately given *ex parte* is in fact the final report;

1 whether or not there have been interim reports; or, whether or not
2 there were reports that, it looks to me, clearly within ONCIX
3 possession or DIA's possession.

4 MJ: We are going away now from the State Department. Let us---
5 -

6 CDC[MR. COOMBS]: But, it is in response to the State Department
7 cables. So, that--I think that is where the confusion comes in. It
8 is ONCIX and the DIA doing an investigation, or getting a damage
9 assessment if you do not like the word investigation because the
10 government does not want to use that word to cover damage
11 assessments; but, putting out an inquiry of, "Here are the questions
12 we want you to answer related to these cables that we have identified
13 from your agency. Give us your response." So, whether or not ONCIX,
14 and again, we would need someone from ONCIX to come testify, did they
15 take what they had and share that with the Department of State which
16 would make sense because how does ONCIX--undoubtedly, without the
17 ability to have them here, it would make sense to the defense that
18 these agencies are cooperating with each other in order to assess any
19 potential damage.

20 MJ: All right. Anything else?

21 CDC[MR. COOMBS]: No, ma'am.

22 MJ: All right, government, when you do coordinate with the
23 Department of State, can you show them what the defense has produced

1 with respect to the testimony of Ambassador Kennedy? Can they
2 address all of this in whatever it is that they submit to me?

3 TC[MAJ FEIN]: Yes, Your Honor. Your Honor, the Department of
4 State is confident that what they submit to you, with a cover letter,
5 would explain, or would be at least clear on its face, that what
6 Ambassador Kennedy testified to, other than one item and that is the
7 part specifically about tasking the missions to do assessments of
8 their host countries, any impact. Other than that, the rest is not
9 part of the damage assessment. It is the overall, almost like a 360
10 approach on how to figure out the way forward for an entire federal
11 department based off of this unprecedented compromise. So,
12 specifically going back to it just because the defense is arguing
13 that just because he testified to, "Establishing a 24/7 WikiLeaks
14 working group composed of senior officials, notably our bureaus",
15 somehow that means a damage assessment, but departments, federal
16 departments, across the board have multiple organizations and they do
17 multiple tasks. The defense has requested only the damage
18 assessments. We have maintained, the prosecution, after coordinating
19 with the Department of State, that they only have a draft that is
20 ever-changing in their possession. That is what we intend to
21 provide. The State Department, through us, intends to provide, and
22 again, on the face should be clear, and this will be written into the
23 motion that will be provided to the defense that this material does

1 not apply to the damage assessments. It applies to other functions
2 within the government.

3 MJ: All right.

4 CDC[MR. COOMBS]: So, ma'am, now we have--not only do we have a
5 definition problem with regards to investigation, we have a
6 definition problem with regards to these sort of damage assessments.
7 The government puts a very limited interpretation on what that word
8 means. According to what Major Fein just said, a 24/7 WikiLeaks
9 working group composed of senior officials throughout the department
10 to assess any potential risk to individuals and to review the cables
11 is not a damage assessment that they need to produce. So again, if
12 we take him at his word and this would not be something that they are
13 inclined to hand over to the defense regardless of the fact that it
14 may very well contain Brady information. So, we have a problem--that
15 is why I think we need to have a department of state representative
16 here who is intelligent enough to know exactly what the agency has
17 done without ability to point a finger at a particular person, other
18 than Ambassador Kennedy, I would say that that person should be
19 Ambassador Kennedy, and give us the opportunity to question
20 Ambassador Kennedy as to what the agency has done with regards to
21 reviewing these cables. Whether you call it a damage assessment, a
22 damage review, a forward thinking piece of paper, whatever term you
23 use and apply to it, it is clear with the defense is seeking and that

1 is, "What was the harm from these releases? What have you done when
2 you look at this from a mitigation standpoint to address it?"
3 Clearly a 24/7 working--WikiLeaks working group looking at all of
4 this to assess any potential risks to individuals would fall within
5 that umbrella.

6 MJ: Major Fein, again, once again we go back to aggravation for
7 sentencing. Is the government going to be presenting, in
8 aggravation, should we get there, evidence of what agencies have
9 these task forces that have been established and all of the work that
10 the government has had to do to mitigate this damage?

11 TC[MAJ FEIN]: Yes, Your Honor. The government would intend, it
12 does intend, to present a limited aggravation case, again, balancing
13 national security with prosecution of a case and due process of the
14 accused, that the government does not get in almost any case dealing
15 with classified information. Just because there is classified
16 information that might be advantageous for the government, it does
17 not require us to use it, or disclose it unless it goes to the merits
18 or under some express rule. So, yes, the government does intend to
19 present a case in aggravation. The material that we rely on for that
20 case absolutely will be produced in discovery but it doesn't
21 necessarily mean all aggravation. And so, in addition to what Mr.
22 Coombs is talking about, the defense--excuse me, if there is Brady
23 material out there as we as we started today with, the prosecution

1 will be reviewing it from the Department of State. So, it does
2 matter what you call it in a specific request, what the defense asks
3 for. All of the rules we have discussed today, from 701(a)(2) to
4 *Williams* says a specific request from a specific entity with a basis.
5 So, if the defense is asking for damage assessments, that's a
6 specific item, the prosecution is required and obligated to go and
7 find that. We have done that, we have come back. If the question
8 now is, "Well, anything the department has", well, that sounds more
9 like a fishing expedition. But regardless of this request, because
10 the prosecution has deemed them affirmatively with the court to be
11 closely aligned, we have an affirmative obligation to review all of
12 their files and from the example--excuse me, search and preservation
13 request we submitted to the court for *Brady* material and we are
14 currently working with the Department of State to finish--to start
15 and finish, we have already started. So, regardless if the damage
16 assessment is a draft or not, whether a working group did, or did not
17 exist, we are going to be reviewing the material for *Brady* and be
18 turning it over if it is, in fact, *Brady* material.

19 MJ: Okay, once again we are back to this material that is--or
20 evidence with the question of material to the preparation of the
21 defense, and that is going to largely depend upon what the government
22 is going to do in aggravation.

23 TC[MAJ FEIN]: Yes, Your Honor.

1 CDC[MR. COOMBS]: And also, when the government says, you know,
2 have an obligation--they do not have an obligation to use all of
3 aggravation, that may be true if they do not want to use certain
4 aggravation but if it is material that is material to the preparation
5 of the defense, they have an obligation to give that information to
6 me.

7 MJ: Well, how would it be material to the preparation of the
8 defense if it is aggravating--not favorable and they don't use it?

9 CDC[MR. COOMBS]: I am talking about the mitigating aspect of
10 it. So, they're looking at--they are only looking at certain
11 aggravation evidence and saying, "This is all we are going to offer."
12 Just in the twelve pages there there is mitigation evidence. So, if
13 the government is only looking at what they are going to offer on
14 their aggravation. This goes back to what I talked about with
15 custody, control and a joint investigation. They are going to the
16 files, pulling from that what they want.

17 MJ: Well, they are pulling from that the Brady material is what
18 they are telling me.

19 CDC[MR. COOMBS]: Well we have to assume they are doing that
20 under the proper standard. But, they even stated right now that
21 unless it goes to the merits or some rules requires them to hand it
22 over, that is the exact quote of what he just said, they are looking
23 at this under a very limited scope. So, we go to what is their

1 interpretation of words? They are interpreting damage assessments
2 now to be their formal damage assessment even though the defense
3 discovery request is, "Any investigation, any file, any damage
4 assessment referencing the alleged leaks in this case and any damage
5 that may have been caused by that, or lack thereof." So, short of
6 giving--getting a--when you say damage assessment, we mean "X" list
7 of definitions from the government. It is clear they are going to
8 interpret everything very narrowly and that is exactly why we need
9 now a Department of State representative on the stand so we can
10 cross-examine them to determine the scope of what they have done and
11 then obtain those documents that are responsive to both our 701(a)(2)
12 request and to ensure that they are looking at the proper documents
13 for *Brady* under 701(a)(6).

14 MJ: Well, let's see what we get from the State Department. We
15 will go that way. I do think that there is a necessity to have a
16 State Department official here but I would like the government to
17 produce what the State Department is doing and has done with respect
18 to the alleged leaks of this case. So at least, you have some idea
19 of what is out there.

20 TC[MAJ FEIN]: Yes, Your Honor.

21 CDC[MR. COOMBS]: But, it appears Your Honor from what the
22 government has said that whatever you are going to get will not
23 reference the five or so items which Ambassador Kennedy testified to.

1 They won't reference the 24/7 WikiLeaks working group because that,
2 "Is not a damage assessment". So, any sort of assessment by this
3 group as to who may be at risk or any countermeasures that need to be
4 taken won't be part of what you receive. The problem with the
5 defense of not having somebody from the Department of State on the
6 stand to testify is we do not get to see the document obviously
7 because they are submitting it *ex parte*. If they submitted it to
8 where the defense could see it then we would be in a position to
9 argue whether or not that is, in fact, responsive to what we are
10 asking for. So, with Ambassador Kennedy, just using his testimony as
11 to what they have done, if what Your Honor receives does not check
12 the block on every one of these things, we should have Ambassador
13 Kennedy here to explain why that is so.

14 MJ: I am just trying to understand if the government does not
15 use any of that as aggravation, how is it material to the preparation
16 of the defense?

17 CDC[MR. COOMBS]: Well, the case law shows that material to the
18 preparation of the defense does not have to be mitigation. It does
19 not have to be----

20 MJ: I agree but it has to be relevant and if the government is
21 not using it?

22 CDC[MR. COOMBS]: Relevant from the standpoint--not a relevant
23 from admissibility, but relevant from the standpoint of something

1 that is attached in some way to the case. Material to the
2 preparation of the defense could be aggravation evidence where once
3 the defense gets it, we can see whether or not a particular line of
4 argument is not a viable option based upon the evidence that we
5 receive. So, for example, with the Department of State cables, the
6 Department of State cables were low-level cables, SIPDIS cables,
7 cables that were not high-level discussions between an Ambassador and
8 the Secretary of State. These were the type of, like, *TJAG Sends-*
9 type documents, these were not high-level discussions. So, what----

10 TC[MAJ FEIN]: Your Honor, just to clarify--Your Honor----

11 CDC[MR. COOMBS]:----If I could finish please?

12 MJ: All right. I understand what you are saying, that is your
13 argument, that they're mitigating, okay.

14 CDC[MR. COOMBS]: Yes my argument is going to be----

15 TC[MAJ FEIN]: And based on all these courses----

16 MJ: Wait just a minute. Let him finish. Go ahead.

17 CDC[MR. COOMBS]: So my argument would be that if, in fact, you
18 had the ability to see exactly what aggravation evidence is out
19 there, let's say there is something out there that says, you know
20 what, even though this says it is a SIPDIS cable, this particular
21 cable gave away the nuclear launch codes for, you know, our missiles.
22 Well, if we knew that, obviously, let's say the government is not

1 going to use that aggravation for whatever reason, if we were aware
2 of it then clearly that would shape our trial strategy tactics.

3 MJ: How would it shape your trial strategy tactics if the
4 government can't use it?

5 CDC[MR. COOMBS]: Well, it is not an issue of the government
6 cannot use it or not, the government chose not to use it. They are
7 saying, "Hey there is some aggravation we might not use." But, it is
8 important for us to know because--we cited several cases and the most
9 one that is on point is when the government--it was a urinalysis case
10 and the government was aware of the fact----

11 MJ: It is *Adens*, I know the case.

12 CDC[MR. COOMBS]: Yeah, exactly. So, that is a prime example
13 where ----

14 MJ: But then the government came back and used the information,
15 that is my point. If they do not use it, they can't--if they don't
16 disclose it, they can't use it in rebuttal either.

17 CDC[MR. COOMBS]: Well, that is, again, you would hope that the
18 trial counsel you realize that but in *Adens*, the trial counsel was
19 like, "Look, hey, it is rebuttal, I do not have to give them notice
20 of rebuttal. I do not know what your defense strategy will be."
21 Even though it may be clear to everyone involved, and our defense
22 strategy would be clear here on, "These cables didn't cause harm."
23 But, if they want to hold something in rebuttal and then spring it on

1 the defense in rebuttal, that is the exact same situation in the
2 *Adens*, where is the trial counsel ----

3 MJ: I am sure Major Fein and the government do not intend to do
4 that. They will disclose whatever it is they have waiting in
5 rebuttal.

6 Is that correct?

7 TC[MAJ FEIN]: Yes, Your Honor.

8 CDC[MR. COOMBS]: All right. So, if they are disclosing all of
9 their rebuttal information as well, that would potentially alleviate
10 that one concern, but we still have other issues with regards to
11 material to the preparation of the defense, just being aware of what
12 information is, especially if we get the mitigation evidence that is
13 similar to these 12 pages from other agencies. Well, then that
14 really allows the defense to go forward with what seems to be clear,
15 and that is these cables were low-level cables that did not cause
16 damage.

17 MJ: And that is the *Brady* material that the government is going
18 to have to turn over to you. I am following you and I agree with
19 you.

20 CDC[MR. COOMBS]: Okay. Thank you.

21 TC[MAJ FEIN]: Your Honor, if I may, three quick points. First,
22 once again, *Brady* requires us to turn over mitigation not
23 aggravation. Two, the defense has been presented, by the government,

1 actual aggravation evidence that has occurred based off the accused's
2 misconduct. To say that no aggravation is out there, I would ask the
3 defense to reconsider that. And three, ultimately if the court was
4 to take the government--the defense's position that all aggravation
5 is material to the preparation of the defense, this is the newest way
6 to graymail the government in a classified information case. A
7 Soldier then could compromise any classified information to any level
8 and then anything--any reaction or any steps the government takes to
9 minimize that for national security then would be discoverable, even
10 if it is aggravating which is why *Brady* is in place and applies to
11 these cases; that we have to produce mitigation. And then, if we
12 choose to use, because weighing national security and the
13 prosecution's case on aggravation on sentencing, choose to use that
14 more sensitive or classified information then yes, we absolutely are
15 required to disclose it to the defense prior to using it. But,
16 again, if the standard is so broad to say, "all aggravation",
17 especially for classified information outside possession of military
18 authorities, then that opens up the entire government and that means
19 any Soldier can do that and hold that against the entire government--
20 over the entire government when they are just trying to enforce
21 national security based off of the disclosure.

22 MJ: All right.

1 CDC[MR. COOMBS]: Just briefly, Your Honor. As far as the
2 aggravation evidence that the government has provided so far, we have
3 not seen anything that is persuasive to the defense, but ----

4 MJ: All right. I'm not the trier of fact and I don't have to
5 decide that now, so let us just move on.

6 CDC[MR. COOMBS]: But, with regards to his argument regarding
7 and the graymail issue, if the government is not holding back
8 anything back on rebuttal then there is no incentive for the defense
9 to try to have the government be forced to present information that
10 is harmful to the defense. So, we are not going to be trying to
11 graymail them in any way shape or form. So, if they are saying that
12 they are going to provide all aggravation that they have, and they
13 have already given us some and they say--and they are going to
14 provide everything else and not hold anything back in rebuttal, then
15 that would, like I said, eliminate that issue.

16 MJ: Well, I do not see it as an issue because *Adens* is from our
17 superior court. It applies in this case and the government will
18 disclose evidence that it may be holding for rebuttal.

19 CDC[MR. COOMBS]: Thank you, Your Honor.

20 MJ: Okay, so let's see what the State Department provides.

21 TC[MAJ FEIN]: Yes, Your Honor.

22 MJ: All right. And, Government, please, be thinking about this
23 issue because what I really do not want to have occur here is having

1 the potential rebuttal information disclosed on the eve of trial
2 after strategies have been prepared by both sides. So, be thinking
3 about that.

4 TC[MAJ FEIN]: Yes, Your Honor.

5 MJ: Make sure we have some timely disclosure of that piece of
6 your aggravation case should that become ripe.

7 TC[MAJ FEIN]: Yes, ma'am.

8 MJ: All right. Now, what about these other--we have these
9 other documents that were turned over to the defense that we are on
10 "E" now. You are talking about the documents you got in Appellate
11 Exhibit 43, is that it--I am sorry, Appellate Exhibit---

12 CDC[MR. COOMBS]: That's correct, Your Honor, Appellate Exhibit
13 43. We just attached that as we were marking the motions this
14 morning.

15 MJ: All right, so this is--I received an e-mail from you in
16 this regard earlier and if you would state just for the record what--
17 an e-mail dated Saturday, April 21st.

18 CDC[MR. COOMBS]: Yes, ma'am. Basically, the issue that we
19 raised there is that the government, when it responded to your
20 questions indicated that ONCIX and DIA did not have any sort of
21 investigative file or forensic report. So, their response to your
22 question was, "No." We got this discovery roughly about the same
23 time that they respond to you with the, "No." And looking through

1 it, it is clear that several of the memorandums are addressed
2 directly to the Office of National Counterintelligence in response to
3 their memorandum, apparently dated 26 October 2010, requesting
4 certain information from these agencies regarding the cables that
5 were allegedly leaked. The DIA also has memorandums that are
6 responsive as far as they put out a memorandum apparently asking for
7 information and agencies responded back to the DIA. This goes back
8 to how you define the term, "investigation", apparently, but----

9 MJ: All right, well this makes this easy. We have forensic
10 results, investigative files, they are responding to specific
11 requests. If you want damage assessments, ask for damage
12 assessments.

13 CDC[MR. COOMBS]: Well, we did, Your Honor. And we asked for
14 them in our discovery request; for any sort of investigative file,
15 any sort of review or activity by these agencies in relation to our
16 case, my client. So, obviously we do not know what the agencies are
17 doing other than what has been publicly reported. So, as the defense
18 became aware, because--not due to discovery, but due to public
19 statements of the various agencies and their involvement and what
20 they were being asked to do, like the DIA being asked to lead the
21 information review task force. Other agencies agreeing to cooperate
22 with the DoD and the Department of Justice in an ongoing
23 investigation. So, we have asked for these items specifically and we

1 have asked in discovery requests, and consistently prior to our
2 motions hearing we got the, "It is not relevant and necessary",
3 response, or, "You have not showed the sufficient specificity", or,
4 "You are on a fishing expedition for this information", when it is
5 absolutely clear the relevancy of this information and what we are
6 looking for. Here is the prime example of that. So to say that
7 ONCIX does not have anything is disingenuous actually. When you look
8 at this memorandum to see that it is clear that ONCIX has put out
9 something in order to obtain, "What were the damage done by these
10 leaks in your agency? Get back to us with your response." And,
11 agencies, I have got one from the FCC, responds to it. How many
12 other agencies have responded to ONCIX? And presumably, the way they
13 identified this, like for the FCC, there were 438 of the cables that
14 were apparently identified that were relevant to the FCC that ONCIX
15 said, "Hey, take a look at these 438 cables, get back to us on what
16 you have done; any sort of harm, any sort of mitigation effort you
17 need to take in order to address these cables." Presumably they have
18 done this with every agency in that is referenced in any of the
19 cables.

20 MJ: Can you point me, in your discovery request and motion to
21 compel discovery, where it was you asked for damage assessments for
22 ONICX[sic] and DIA just so I can find it?

1 CDC[MR. COOMBS]: Yes, well it is both within our discovery
2 request, which is going to be part of the motion to compel discovery,
3 where we have listed every one of our 15 or so discovery requests,
4 from the beginning of the case to the end. It is referenced within
5 the motion, ONCIX is named by name within our motion. And,
6 repeatedly, like I said, as soon as we became aware of some agency
7 and usually that was from a media account, was involved in the
8 investigation of the case, then we asked the government to produce
9 anything from that agency that was relevant to this case. So, it was
10 not just a limited discovery request, "Just give us a damage
11 assessment." It was, "Give us any reports or records from that
12 agency relevant to this case." And, that is within every one of our
13 discovery requested that was referencing ONCIX and that also was
14 within our motion to compel discovery. And as we have said in our
15 motion to compel discovery, it has been a long journey to try to get
16 this information. At the very beginning, we asked for this
17 information. And it was over six/seven months before the government
18 first did a response to any of our discovery requests. And, they did
19 a discovery request[sic] *en masse* to all of our discovery requests,
20 and their discovery response was, "Deny, deny, deny, not relevant and
21 necessary." And then, we renewed the request for all of this stuff
22 at the Article 32. And again, it was denied. And as Your Honor
23 knows, at our very first 802 conference, where I said the very--we

1 are going to be prepared for a motion to compel discovery at our very
2 first Article 39(a). And the government said, "Hey, we are not for
3 sure what you are going to raise." And I told the Court then what I
4 am telling it now, that we have been asking for the same thing time
5 and time again. This is not playing hide the ball with what
6 information we want. But now, it seems that again it is, if you do
7 not use the exact term that the government wants you to use as far as
8 interpreting what you are asking for, knowing full well what we are,
9 in fact, asking for, they are going to say, "There is no information,
10 we do not have that."

11 MJ: All right, well Major Fein, let's just use the term,
12 "damage assessments" instead of the other terms that we have been
13 using. Is there a damage assessment by ONICX[sic]?

14 TC[MAJ FEIN]: Ma'am, they have not completed a damage
15 assessment, they have not produced an interim or final damage
16 assessment. It is an ongoing process.

17 MJ: So, you are looking through all of the raw data of that
18 ongoing process to find materials like what you just released to the
19 defense?

20 TC[MAJ FEIN]: Actually, ma'am, because of the charter, they
21 receive inputs from different federal agencies and departments and we
22 are reviewing those actual ones that they are receiving at the top of
23 the pyramid and reviewing those as the underlying information,

1 because that is the underlying information. And, that is actually
2 the product, the discovery that the defense received last week was
3 the result of our due diligence search for that material. So even
4 though the defense did not specifically request that material, the
5 prosecution is still going out and finding that material that is
6 related to the damage assessments. Because, the ultimate issue is it
7 does matter what the defense requests because that is what puts us on
8 notice to actually go find it. Damage assessments, we have been
9 tracking since before the first request and we are finding that even
10 the ones that the defense has not requested, the prosecution
11 continues to work with different entities in the federal government
12 to find damage assessments. What this current issue is about,
13 forensic results and investigative files and that is what truly ends
14 up being confusing because the defense groups those with damage
15 assessments. Damage assessments, understand. When it comes to
16 forensic results and investigative files, the government maintains
17 they do not exist at those entities. As in the previous conference,
18 we did ask the court to take leave of the court for at least Thursday
19 in order to properly brief the difference between a damage assessment
20 and investigation, which I think would be beneficial both to the
21 Court and the defense. Mostly, Your Honor, because one quick example
22 is simply searching federal law would look at exactly what the
23 charter for NCIX is from the 2002 Counterintelligence Enhancement

1 Act. 50 U.S.C. 402(c)(d)(4) specifically explains how they do not
2 conduct investigations, they simply do assessments because that is
3 what they are chartered to do. They are not the organization to
4 investigate anything. And so, this is the type of research that
5 defined what an investigation is and an assessment is. And once
6 again, we are reviewing the material for *Brady* regardless of what we
7 call it.

8 MJ: So, why don't you go ahead and attach all of that as an
9 Appellate Exhibit and brief the Court should you desire. Let's just
10 view from now on, damage assessment is a term of art.

11 TC[MAJ FEIN]: Yes, ma'am.

12 MJ: If you want damage assessments, say you want damage
13 assessments.

14 All right, so----

15 CDC[MR. COOMBS]: But within that, ma'am though, just, your
16 motion to compel--or excuse me, your ruling indicated that they
17 needed to look for the investigative files for ONCIX, so you have
18 your ruling saying, "Go look for any investigative file." We have
19 asked for damage assessments. So, whichever way that you look at the
20 issue, if it falls under a definition of damage assessment or it
21 falls under a definition of investigation, there has to be something
22 that is responsive to that request. The government cannot just say,
23 "You have not picked the right word, even though we fully well know

1 what you are asking for. And, therefore, we are not going to provide
2 that to you."

3 MJ: Once again, we are back where we were before on the
4 material to the preparation of the defense issue which is largely
5 going to turn, I cannot--unless you present some other theory of
6 relevance to me with respect to these assessments on whether the
7 government is using any of this in their aggravation case if it is
8 not mitigating.

9 CDC[MR. COOMBS]: I think they really should turn, not on that.
10 It should turn on whether or not it is within the possession, custody
11 or control of the government, the trial counsel in this case under
12 our motion for the grand jury. The same logic would apply to any
13 other closely aligned agency, which you found ONCIX is closely
14 aligned. So, the issue should turn on whether or not it is under
15 701(a)(2), within their possession, custody or control." It does not
16 have to be as far as high as the factual----

17 MJ: It has to be material to the preparation of the defense.

18 CDC[MR. COOMBS]: Exactly. And so, we would say that ONCIX has-
19 -definitely has material that is material to the preparation of the
20 defense.

21 MJ: How would that be if it is aggravating and then the
22 government does not use it?

1 CDC[MR. COOMBS]: Well, with regards to a specific request under
2 701(a)(2), we don't have to rely upon whether or not the government
3 uses it, but the issue is, we have asked for these things under
4 701(a)(2). It is within their possession, custody or control.

5 MJ: But, you only get it if it is material to the preparation
6 of the defense.

7 CDC[MR. COOMBS]: And material to the preparation of that
8 defense, the case law indicates can be mitigating obviously. It can
9 be aggravating. It can be any matter which would then would help
10 inform you as to which witnesses you should could call, which
11 witnesses you shouldn't call. The material to the preparation of the
12 defense has to be viewed--that sentence, actually, has to be viewed
13 through the eyes of a defense counsel preparing for his or her case
14 at the very beginning. That is exactly the appellate standard that
15 applies to material to the preparation of the defense. Viewing it
16 from that standpoint, that is not a huge threshold to get over, so
17 the issue really should turn on whether or not it is within their
18 possession, custody or control. Once it is and has been specifically
19 requested by the defense, we should have it handed over to us unless
20 they think, for some reason, "No, this is under no stretch of the
21 imagination would this be material to the preparation of the
22 defense." Then, under 701(a)--(g), they should seek to be relieved
23 from their obligation to hand this over.

1 MJ: Okay. All right, so you are filing the motion to compel,
2 is that correct?

3 CDC[MR. COOMBS]: We have, Your Honor.

4 MJ: No, I mean I thought you were filing something new with
5 respect to this that was going to be litigated at the next Article
6 39(a) session.

7 CDC[MR. COOMBS]: Yes, and it depends, apparently--we are going to
8 file a motion regardless, but your ruling on the grand jury issue, as
9 far as how you would view what is in the possession, custody, and
10 control under 701(a)(2) would help inform that ruling--or that
11 motion. So, if your ruling is favorable to the defense on that
12 issue, based upon the Court's previous rulings with regards to who is
13 jointly aligned or part of a joint investigation, who is closely
14 aligned, then we would just simply make a request for you to
15 determine that those records are also within the possession, custody,
16 or control; so it would be a shorter motion.

17 MJ: Okay.

18 TC[MAJ FEIN]: Your Honor, just off the very last point, if the
19 court is inclined to rule that any material that falls under the
20 *Williams*, closely aligned, also applies to, as the defense is
21 arguing, to 701(a)(2), there is also a factual issue there instead
22 of--rather than the court ruling across-the-board because if it
23 actually is not in the possession, control, not even in the

1 fingertips of the prosecutors or even if we have the ability to grab
2 something, and that would seem to defy that ruling. So again, it
3 would be----

4 MJ: That is why you have to go to evidence production in R.C.M.
5 703.

6 TC[MAJ FEIN]: Which is what we already--yes. So, again just
7 saying that because based off what Mr. Coombs just argued, if you
8 were to rule in favor for grand jury and then impute that on to this
9 issue, again, we would ask to--at least hold that follow on ruling
10 until we fully litigate this issue.

11 MJ: Well, this is going to be ruled on in the next motion
12 session. I just got this on Saturday.

13 TC[MAJ FEIN]: Yes, ma'am.

14 MJ: All right. So I believe the issue that we have remaining
15 is the defense renewal for a bill of particulars. Now, Mr. Coombs,
16 explain this to me. I am confused as to why this is coming before me
17 again.

18 CDC[MR. COOMBS]: Yes, Your Honor. At our previous dealing with
19 this, the court ordered the defense to provide both to the defense--
20 excuse me, the government and the court any--any authority to
21 indicate the difference between stealing and converting. So, we have
22 this issue of requesting a bill of particulars as to what is the
23 defense's--excuse me, the government's theory with regards to these

1 641 offenses. Are they proceeding under a stealing, a purloining or
2 a knowingly converted? Or, are they, for some of the documents or
3 all the documents or is there a combination thereof? And, the issue
4 that seemed to come out is the government believed there was no
5 difference between stealing and purloin and felt that they should not
6 be boxed in on having to give up their theory. And essentially, that
7 was their argument. From the last motions hearing the court
8 requested that--when the defense said there is a difference between
9 steal, purloin, and knowingly converted, so if this were charged in
10 Article 121, the government alleged all of the various types of
11 larceny the court would rightfully so say, "Government, pick a
12 theory. What are you going with? Or at least alert the defense you
13 are going with all of them with regards to each of the offenses."
14 So, being responsive to the court's requirement, we cited both to the
15 court and the government *Morissette v. United States*, 342 US 246 and
16 there the Supreme Court clearly pronounced the difference between
17 steal, purloin, and knowingly convert and based upon that then we
18 renewed our request that the government be required to at least
19 indicate which theory it was alleging if there was a difference. So,
20 for each of the 641 offenses, are they saying steal, are they saying
21 purloin are they saying knowingly convert?

22 MJ: They can say all of them if they want to.

1 CDC[MR. COOMBS]: Or--and that is fine, as long as they
2 indicate, "Hey, we are proceeding under all three for each of them.
3 We intend to prove that he stole, purloined and knowingly converted
4 for each of those things." Or, is there a difference, like, you
5 know, with regards to this specification, we are only alleging
6 stealing but with regards to this specification we are alleging
7 stealing and convert. So all we were asking for was an indication as
8 to what theory the government is advancing, because there is a
9 difference. And so, when we cited that difference to the court, the
10 defense's position is, "Look, we shouldn't be required to prepare the
11 contingencies for a proof for each of those defenses if the
12 government is, in fact, proceeding under one." If they are proceeding
13 under all three of them, just like if they had charged a 121 with all
14 of the various ways you commit a 121, you know, if you have a
15 particular theory, let us know what it is that way there is no hiding
16 the ball and the defense can prepare for that period.

17 MJ: All right, you have a withholding and an obtaining, it
18 could be either one. The government can charge them both, right?

19 CDC[MR. COOMBS]: I am sorry, with regards to?

20 MJ: In regards to the Article 121 offense example that you are
21 giving me.

22 CDC[MR. COOMBS]: Sure.

1 MJ: Housing fraud, do not know if you simply withheld it or you
2 went out and got it.

3 CDC[MR. COOMBS]: Right.

4 MJ: So you charge both in the same specification. Is there any
5 issue with that?

6 CDC[MR. COOMBS]: Not at all. And, what would happen normally
7 is then the judge would say, "Government, what are you alleging,
8 withholding or obtaining?" "Your Honor, we are alleging both. We
9 believe he did both." Or, "contingency of proof, we believe that we
10 have the evidence to prove either but we are going to run with
11 contingency of proof." That is fine, we are not trying to box them
12 in particular theory. If they are saying, "We believe he stole,
13 purloined and knowingly converted with regards to each of the items
14 alleged in the various 641 specifications." Okay but if there is a
15 particular theory because it appears that they just charged it based
16 upon the 641 offense as opposed to, "Hey, our theory is, he stole."
17 Or, "Our theory if he knowingly converted." That is all we are
18 asking.

19 MJ: All right, and if I read your definitions correctly, am I
20 understanding what you are saying is the difference between steal and
21 convert is, steal means you are taking something; and, converting
22 means you could actually have authorized possession of it but then
23 you use it in an authorized way. Is that what you are advising me?

1 CDC[MR. COOMBS]: Well, what the court said in *Morissette*, the
2 Supreme Court, to knowingly convert property means to use the
3 property in an unauthorized manner in such a way that it
4 substantially interferes with the government's use of the property.
5 So that could be an unauthorized possession, oftentimes though it has
6 been authorized possession and you used it in such a way that
7 substantially interfered with the true owner's rights in the
8 property. And, that is how you get conversion as opposed to stealing
9 where the intent is to permanently deprive the true owner of the
10 property.

11 MJ: All right.

12 Government, let me ask you, do you agree with the defense's
13 three definitions that they sent the Court via e-mail?

14 ATC[CPT MORROW]: Your Honor, I think that, you know conversion
15 is sort of--they are all common law definitions of those offenses,
16 but I think the real issue here is the difference between a
17 conjunctive and disjunctive plea. If the defense is satisfied that a
18 change from "or", to "and" satisfies their notice issues and the
19 panel was instructed in the disjunctive at trial, the government--I
20 would have to talk to co-counsel but I do not think we have an issue
21 with that. I am not sure exactly--we are--at this time, we feel the
22 pleading adequately addresses any notice issues with the defense and

1 we do not think we need to specify the theory we are working on. We
2 are working on all three.

3 MJ: Well, that is, I guess, in all of the specifications that
4 you are addressing or is the government looking at all three
5 theories?

6 ATC[CPT MORROW]: Yes, Your Honor. Because, I think there are
7 some exigencies of proof and we would like to keep all three theories
8 as part of the specification.

9 MJ: Okay.

10 Have they answered your question?

11 CDC[MR. COOMBS]: It appears that the answer is, "We are
12 proceeding under all three theories. We are going to prove that he
13 stole, purloined, and knowingly converted", then that answers my
14 question; if that is their answer.

15 MJ: Is that your answer?

16 ATC[CPT MORROW]: Yes, your honor, except that, I mean, some of
17 this is dependent upon how the panel would be instructed at trial. I
18 mean, I assumed that we would not have to prove all three, we would
19 only have to prove one of those three.

20 MJ: They are three different means of committing an offense.

21 ATC[CPT MORROW]: Right.

22 MJ: You can charge one offense by multiple means, that is all
23 right, *United States v. Griffin*. So, what else do we need to--am I

1 missing something, is there anything else that we need to look at
2 here?

3 CDC[MR. COOMBS]: With regards to this issue, no, ma'am. If
4 they are saying they are proceeding on all three, that is what the
5 defense wanted to know.

6 MJ: Okay.

7 ATC[CPT MORROW]: That satisfies us, Your Honor.

8 MJ: All right. Is there anything else we need to address
9 today? As I said, we are going to go on the record tomorrow. I
10 would like to do the same procedure. And, I probably intend to do
11 this for all of the 39(a) sessions, in just me with counsel briefly
12 in advance of the session and then begin at 1000.

13 Is that acceptable to the parties?

14 CDC[MR. COOMBS]: Yes, Your Honor.

15 TC[MAJ FEIN]: Yes, Your Honor.

16 MJ: All right. Is there anything else that we need to address
17 today?

18 TC[MAJ FEIN]: May I have just a moment, Your Honor?

19 MJ: Yes, please. [Pause]

20 TC[MAJ FEIN]: Nothing further, Your Honor.

21 CDC[MR. COOMBS]: Nothing from the defense, Your Honor.

22 MJ: All right. Court is in recess.

23 **[The Article 39(a) session recessed at 1543, 24 April 2012.]**

1 [The Article 39(a) session was called to order at 1006, 25 April
2 2012.]

3 MJ: This Article 39(a) session is called to order.

4 Let the record reflect all parties present when the court
5 last recessed are again present in court.

6 All right, the Court has issued a protective order. We
7 discussed that on the record yesterday for procedures that will take
8 place for redactions when the defense files its proposed motions and
9 other court filings on the Internet. That has been marked as
10 Appellate Exhibit 67. I discussed the interim order yesterday. This
11 protective says basically the same thing, just establishing a
12 different schedule.

13 The parties and I met in an R.C.M. 802 conference yesterday
14 after court was recessed to go over a proposed case calendar and
15 scheduling for the remaining proceedings and we have come up with a
16 draft case calendar and I will have it marked as Appellate Exhibit,
17 not just yet, just as soon as I can get some automation problems
18 fixed. But, in essence, what the case calendar is envisioning is an
19 Article 39(a) session, such as we are holding today, the next one
20 would be scheduled the 6th through the 8th of June of 2012; the one
21 after that will be scheduled 16th through 20th of July 2012; and the
22 one after that would be scheduled the 27th through 31st August 2012;
23 followed by another Article 39(a) session the 19th and 20th of

1 September 2012; followed by trial, which is currently scheduled to
2 begin on the 21st of September, and at this point is scheduled to go
3 through the 12th of October of 2012.

4 Once again, these are dates that have been agreed to by the
5 parties along with suspenses for various motions that will be filed
6 along the way. This can always change. The schedule is going to be
7 reviewed at each Article 39(a) session depending on new issues that
8 may arise in cases, they may change. So at this point, this is what
9 the trial schedule is going to be.

10 Does either side have anything further to add?

11 CDC[MR. COOMBS]: No, Your Honor.

12 TC[MAJ FEIN]: No, Your Honor.

13 MJ: All right. The Court is prepared to rule on the defense
14 motion to dismiss all charges with prejudice.

15 The defense moves under R.C.M. 701(g)(3)(D) to dismiss all
16 charges with prejudice for discovery violations. The government
17 opposes. After considering the pleadings, evidence presented and
18 arguments of counsel, the Court finds and concludes the following:

19 Findings of fact and the law.

20 The Court adopts the findings of fact contained in its
21 ruling re: Motion to Compel Discovery and Law Therein.

1 Conclusions of law.

2 In trial by general court--when in trial by general court-
3 martial in the military justice system, charges are preferred against
4 an accused, the charges are investigated by an Article 32
5 investigating officer and forwarded with recommendations to the
6 Convening Authority who makes the decision whether to refer the case
7 to trial, R.C.M. 307, 405, 406, 407, 504 and 601.

8 2. In this case, the original charges were preferred on 5
9 July 2010 and dismissed by the Convening Authority on 18 March 2011.
10 The current charges were preferred on 1 March 2011. The Article 32
11 investigation was held 16 to 22 December 2011. The convening
12 authority referred the current charges to trial by general court-
13 martial on 3 February 2012.

14 3. Unlike trials in federal district court, a military
15 judge is not detailed to a court-martial until the case is referred.
16 This case was referred on 3 February 2012, Article 26(a), Uniform
17 Code of Military Justice.

18 4. Rule for Court-Martial 701 and Rule for Court-Martial
19 703, govern discovery and production of evidence after a case been
20 referred for trial by the convening authority and a military judge
21 has been detailed.

22 5. The President promulgated Rule for Court-Martial 701 to
23 govern discovery and Rule for Court-Martial 703 to govern evidence

1 production after referral. The rules work together when production
2 of evidence is not in the control of--evidence not in control of the
3 military authorities is required and necessary for discovery; *United*
4 *States v. Graner*, 69 MJ 104, Court of Appeals for the Armed Forces,
5 2010. The requirements for discovery and production of evidence are
6 the same for classified and unclassified information under Rule for
7 Court-Martial 701 and 703, unless the government moves for limited
8 disclosure under Military Rule of Evidence 505(g)(2) or claims the
9 Military Rule of Evidence 505, Privilege for Classified Information.
10 If the government voluntarily discloses classified information to the
11 defense, the protective order and limited disclosures provisions of
12 Rule for Court-Martial [sic] 505(g) apply. If, after referral, the
13 government invokes the classified information privilege, the
14 procedures of R.C.M.--excuse me, of M.R.E. 505(f) and (i) apply.

15 6. From the 8 March 2012 government response to the
16 defense motion to compel discovery and its e-mail of 22 March 2012,
17 the court finds that the government believed Rule for Court-Martial
18 701 did not govern disclosure of classified information for discovery
19 where no privilege has been invoked under M.R.E. 505. This was an
20 incorrect belief. The Court finds that the government properly
21 understood its obligation to search for exculpatory *Brady* material,
22 however the government disputed that it was obligated to disclose

1 classified *Brady* material that was material to punishment only. The
2 court finds no evidence of prosecutorial misconduct.

3 7. Although the Rules for Court-Martial and military case
4 law encourage early and open discovery, the defense does not have a
5 right to discovery under Rule for Court-Martial 701 or *Brady* prior to
6 referral on 3 February 2012.

7 8. Most of the information contained in the damage
8 assessments requested by the defense is maintained by other
9 government agencies. To obtain such information from other
10 government agencies under Rule for Court-Martial 703(f)(4)(a),
11 whether discoverable under Rule for Court-Martial 701 or not,
12 requires the defense to show relevance and necessity. The government
13 does not have authority to compel production of evidence from other
14 government agencies under Rule for Court-Martial 703(f)(4)(a) until
15 after the case is referred.

16 9. As the Court held in its 23 March 2012 ruling, re:
17 motion to compel discovery, the fact that information is controlled
18 by another agency is discoverable under Rule for Court-Martial 701
19 may make such information relevant and necessary under R.C.M. 703.

20 10. The government has requested 13 departments, agencies
21 and commands to segregate and preserve records involving WikiLeaks
22 and requested information potentially discoverable from more than 50
23 additional agencies. This is a complex case involving voluminous

1 classified information in the custody of multiple government agencies
2 who have national security concerns with the disclosure of this
3 information. As of 12 April 2012, the government has produced 2,729
4 unclassified documents consisting of 81,273 pages and 41,550
5 classified documents totaling 336,641 pages. To secure this release,
6 the government coordinated with multiple government agencies to issue
7 protective orders under military rule of evidence 505(g) and court
8 orders for release of grand jury matter.

9 11. It is not unreasonable for government agencies
10 possessing potentially discoverable classified information to await
11 the detail of a military judge to litigate the issues of relevance,
12 materiality and necessity and subsequently to litigate issues arising
13 under Military Rule of Evidence 505 and Military Rule of Evidence 506
14 prior to releasing classified information to the trial counsel to
15 disclose to the defense.

16 12. The defense moved to compel the discovery it desires
17 on 14 February 2012, 11 days after referral. On 23 March 2012, the
18 court ordered the government to immediately begin the process of
19 producing the damage assessments for *in camera* review to assess
20 whether they are favorable or material to the preparation of the
21 defense under R.C.M. 701(a)(6), R.C.M. 701(a)(2) and *Brady*; to
22 immediately cause an inspection of the 14 hard drives; to contact the
23 Department of State, FBI, DIA, ONCIX and CIA to determine whether any

1 of these agencies contained any forensic results or investigative
2 files relevant to the case; to advise the court by 20 April 2012
3 whether it anticipates any government entity that is the custodian of
4 classified information subject to the defense motion, to compel and
5 seek disclosure under--in accordance with M.R.E. 505(g)(2) or claim a
6 privilege under M.R.E. 505(c); and, by 18 May 2012 to disclose any
7 favorable unclassified information from the three damage assessments
8 to the defense and all classified information from the three damage
9 reports to the court for in camera review.

10 13. The parties proposed trial schedule anticipates trial
11 taking place in between September and November 2012 absent the
12 unanticipated filings of additional motions. Litigation of disputed
13 discovery is taking place well before trial.

14 There is no discovery or *Brady* violation in this case.

15 The defense motion to dismiss all charges with prejudice is
16 denied.

17 Is there anything further on that motion from the parties?

18 CDC[MR. COOMBS]: No, Your Honor.

19 TC[MAJ FEIN]: No, Your Honor.

20 MJ: All right, the Court is also prepared to rule on the
21 defense motion to compel grand jury testimony.

22 The defense moves the Court to compel the government to
23 produce the entire grand jury proceedings in relation to PFC Manning

1 or WikiLeaks in accordance with R.C.M. 701(a)(2) as material to the
2 preparation of the defense or, in the alternative, moves the court to
3 order the testimony produced for *in camera* review to determine
4 whether the evidence is discoverable under R.C.M. 701(a)(2). If the
5 Court determines that grand jury testimony is not in the possession,
6 custody, or control of military authorities, the defense moves the
7 court to order production of the entire grand jury investigation
8 under the relevant and necessary standard of Rule for Court-Martial
9 703. The government opposes on the grounds that the FBI files are
10 classified, Department of Justice files relating to the accused and
11 WikiLeaks are law enforcement sensitive and contain grand jury
12 information and the prosecution has no authority to produce any FBI
13 or DOJ files that have not already been produced to the defense.

14 Findings of fact.

15 1. FBI participated with CID in a joint investigation of
16 the accused. CID was lead agency with respect to the investigation
17 concerning the accused.

18 2. There has been one or more grand jury investigations
19 involving WikiLeaks.

20 3. The government has access to the FBI files and other
21 grand jury proceedings for the purposes of reviewing them for
22 favorable information material to the guilt or punishment that must
23 be disclosed to the defense under *Brady v. Maryland* 373 US 83 1963.

1 The law.

2 1. Grand jury proceedings are not discoverable under Rule
3 for Court-Martial 701. Such proceedings are not books, papers,
4 documents, photographs, tangible objects, or places in accordance
5 with R.C.M. 701(a)(2), nor are they within the possession, custody,
6 or control of military authorities. Neither the government nor any
7 other military authority has authority to disclose grand jury matter
8 without an order from the District Court where the grand jury
9 convened, Federal Rule of Criminal Procedure 6(e)(3)(F).

10 2. Rule for Court-Martial 702 is based upon Federal Rule
11 of Criminal Procedure 16(a)(1)(E). Federal Rule Of Procedure
12 16(a)(1)(G)(3) states that Rule 16 does not apply to the discovery or
13 inspection of a grand jury's report of proceedings except as provided
14 in Federal Rule for procedure 6, 12(h), 16(a)1 and 26.2.

15 3. Grand jury proceedings are secret. Provisions
16 authorizing limited disclosures are governed by Federal Rule of
17 Procedure 6(e). The District Court where the grand jury convened may
18 authorize a disclosure preliminary to or in connection with a
19 judicial proceeding. A petition to disclose grand jury matter must
20 be filed within the District Court where the grand jury convened,
21 Federal Rule of Criminal Procedure 6(e)(3)(E), (I), and (F).

22 4. As the FBI and DOJ are aligned law enforcement agencies
23 who have participated in a joint investigation of the accused, the

1 government has a duty to review such investigative files maintained
2 by the FBI and DOJ to include grand jury matter for exculpatory *Brady*
3 material and disclose the existence of such material to the defense.
4 If such files are under the control of another government entity,
5 trial counsel must make that fact known to the defense and engage in
6 good-faith efforts to obtain the material, *United States v. Williams*
7 50 MJ 436 Court of Appeals for the Armed Forces 1999.

8 5. Rule for Court-Martial 914, production of statements of
9 witnesses provides that after a witness testifies on direct
10 examination the party who called the witness is required to produce
11 any statements by the witness for examination and use by the other
12 party. Statements include those made by a witness to a federal grand
13 jury, Rule For Court-Martial 914(f)(3).

14 6. Federal courts require parties seeking access to grand
15 jury transcripts to show a particularized need and that the material
16 they seek is necessary to avoid a possible injustice. The need for a
17 disclosure is greater than the need for continued secrecy and the
18 request is structured to cover only material needed; *United States v.*
19 *McDavid* 2007 Westlaw 926664 Eastern District of California 2007;
20 *United States v. Upton* 856 Federal Supplement 727 Eastern District of
21 New York 1994.

22 Conclusions of law.

1 1. Grand jury are matters not discoverable under R.C.M.
2 701.

3 2. The government is required to access and examine any
4 grand jury investigations germane to the accused for exculpatory
5 *Brady* information and disclose the existence of such information to
6 the defense.

7 3. The government is required to disclose prior grand jury
8 statements of any government witnesses who testify in accordance with
9 R.C.M. 914. Although the Rules do not require the government to
10 disclose such statements until after the witness has testified under
11 direct examination, the court will exercise its discretion under Rule
12 for Court-Martial 801(a)(3) to set a reasonable deadline for such
13 disclosure in advance of trial.

14 4. The defense moved the court to compel the production of
15 the entire grand jury investigation as relevant and necessary under
16 Rule for Court-Martial 703(f). The defense has not demonstrated a
17 basis for relevance and necessity much less the particularized need
18 required to access grand jury transcripts.

19 Ruling.

20 The defense motion to compel discovery--production of the
21 entire grand jury investigation involving the accused and WikiLeaks
22 is denied. The government will examine such grand jury
23 investigations for exculpatory *Brady* material and prior statements

1 required to be produced under Rule for Court-Martial 914 and will
2 take appropriate steps under Federal Rule of Criminal Procedure 6(e)
3 to disclose such information to the defense.

4 Is there anything further with respect to the motion to
5 compel grand jury testimony?

6 CDC[MR. COOMBS]: No, Your Honor.

7 TC[MAJ FEIN]: No, Your Honor.

8 MJ: All right. Next at issue is the defense motion to dismiss
9 for unreasonable multiplication of charges.

10 Mr. Coombs, would you like to argue?

11 CDC[MR. COOMBS]: Yes, Your Honor.

12 MJ: And for the record, that would be Appellate Exhibit 57.

13 And the government's response is Appellate Exhibit 58.

14 Proceed, Mr. Coombs.

15 CDC[MR. COOMBS]: Thank you, Your Honor.

16 Your Honor, the government has unreasonably multiplied the
17 charges against my client in two different ways. First, on four
18 separate occasions they have taken what is essentially a single
19 criminal act and they divided that into two separate offenses. And
20 second, kind of related, they have taken what has occurred on a
21 specific day, allegedly, and divided that into separate offenses. I
22 will deal with the first argument.

1 The government has on four occasions charged PFC Manning
2 twice for the same criminal act. If Your Honor looks at the charge
3 sheet, Specifications 4 and 5, Specifications 6 and 7, 8 and 9, and
4 12 and 13 are the four variations that the defense is pointing to; 4
5 and 5 deal with the Iraq database; 6 and 7 with the Afghanistan
6 database; 8 and 9 with the Southern Command database; and, 12 and 13
7 with the Net-Centric Diplomacy database.

8 In *Quiroz*, CAAF said it is an unreasonable multiplication
9 of charges, in that instance, in that case, when the government
10 charged the appellant twice with the sale of the same C4. And that
11 is what we have in this case. Just as in *Quiroz*, the government has
12 charged my client twice with the same unauthorized disclosure. When
13 you take a look at the 641 and 793 offenses, and this would apply for
14 both 4, 5, 6, 7, 8 and 9 so maybe just start with the 4 and 5. PFC
15 Manning could not have disclosed the records that the government is
16 alleging he did in Specification 5 without first, as alleged by the
17 government, either obtaining those records through stealing,
18 purloining, or knowingly converting the records. You had to obtain
19 the records prior to an unauthorized disclosure. So, the 641
20 violation the government has alleged, specification 4 is merely the
21 first step of the alleged activity that composes the 793 violation.
22 Likewise, when you look at Specifications 12 and 13, ma'am, they
23 alleged a 641 and a 1030 offense dealing with the Net-Centric

1 Diplomacy Database. The government's theory there, before PFC
2 Manning could have willfully disclosed information covered by section
3 1030, he first was required to exceed his authorized access to a
4 computer to obtain information. PFC Manning's alleged theft and
5 conversion of the database was basically rolled up into his exceeding
6 authorized access and obtaining the information. So, in other words
7 you cannot do a 1030 offense without committing a 641 offense. And,
8 that is important, because Congress could have, but did not, cross-
9 reference 641 and 793 or 641 and 1030.

10 MJ: I am not sure I understand that. What do you mean, "cross-
11 reference".

12 CDC[MR. COOMBS]: If Congress wanted to allow and indicate that
13 you can have a 641 offense in addition to a 793 offense when clearly
14 the conduct that would be composed within the 641 offense, that is
15 stealing some--or converting some government property, is within the
16 conduct that you have to do in order to commit a 793 offense. They
17 could have cross-referenced that to say you could charge the two of
18 them because they go, maybe, at distinct criminal acts. But, that is
19 not what Congress did. And, in fact, when you look at 793, Congress
20 laid out the elements that would be required and one of those is that
21 you obtain the property in some way in order to get it--to give it to
22 another person for non-authorized purpose. And, within that,
23 Congress decided that the maximum punishment for that should be 10

1 years. Now, because you cannot have a 793 offense without committing
2 the conduct of his alleged and 641, and because you cannot have a
3 1030 without doing the same, the defense's position is this is
4 exactly like *Quiroz* where the government chose in *Quiroz* to charge
5 the appellant with a violation of Article 108 or stealing military
6 property and then with a violation of 18 U.S.C. 842 for the
7 possession, storing, transporting or selling military property.
8 There, CAAF said, "Look, what you have done is you have charged the
9 exact same criminal act. Both charges were aimed at the exact same
10 criminal act. He could not have unlawfully possessed or stored or
11 transported the C4 without taking it, so you have charged him with an
12 Article 108 and with a violation of 18 U.S.C. 42. Also happen to
13 carry 10 year Max's." And, CAAF determined that was an unreasonable
14 multiplication of charges because you doubled the punishment. It is
15 like if this MCM were in fact, classified information and I took the
16 classified information and I handed it to someone. That would be the
17 unauthorized disclosure, but I have to take it. So, the government's
18 position here, taking it as 641 and then even if I am handing it
19 over, that is the 793 offense. And the defense's position is that is
20 aimed at the exact same criminal act and cannot do the 793 or the
21 1031--or excuse me, 1030(a)(1) without initially taking it. And, it
22 is important to note that we look at the *Quiroz* factors that by
23 charging it this way, by creatively charging the 641 with the 793 for

1 the exact same criminal act and doing that again for the 1030
2 offense, what you do is you take a 10 year max that Congress has said
3 should be the max per 793 or for a 1030 offense and you have now made
4 it a 20 year Max. Because, under no circumstances could you ever
5 have a 793 without the ability to charge, apparently, the 641. And
6 that goes back to why, if Congress had that intent to allow a 641 in
7 addition to a 793 or a 1030 offense, they would have indicated as
8 such, certainly when the maximum punishment is in effect, doubled,
9 due to the charging decisions. Now you look at *Ball*, a case cited by
10 the defense at 470 US at 861, the Court there, the Supreme Court,
11 also was concerned with the fact that extra convictions can be the
12 basis and we have determined to be the basis for an unreasonable
13 multiplication charges. So now, under the government's theory, a 793
14 offense or a 1030 offense now carries with it two convictions, both
15 the 793 and 1030 and the 641 when they are aimed at the exact same
16 criminal act.

17 MJ: You say they are aimed at the exact same criminal act,
18 could a person commit a 641 offense and then stop?

19 CDC[MR. COOMBS]: Yeah, that actually goes to the two cases
20 cited by the government, the *Chapman* case and, I believe it is the
21 *Brumfield* case. And in *Chapman* and *Brumfield*, the Court said you
22 could have a forgery and a larceny aimed at distinct criminal acts,
23 because you can commit a forgery, stop and you have committed the act

1 it is done and the larceny is not committed until you obtain the
2 money. *Chapman* is difficult to address because it does not give any
3 facts for the defense to see what the Court's interpretation was.
4 But, *Brumfield* actually helps make the defense's argument because the
5 when the court said you can do a forgery and complete that and then
6 do a larceny, that is why you can charge them separately. Here you
7 really cannot have a 793 offense without the taking. So, had there
8 been no unauthorized disclosure then, yeah, you could have a 641
9 offense. But, you cannot have a 793 offense without the taking.
10 And, the *Brumfield* court actually found an unreasonable
11 multiplication of charges with respect to the wire fraud and the
12 false claims account within that. And, in doing so, the issued this
13 very important line, "Under the facts of this case, the offenses of
14 wire fraud in making a false against the United States were aimed at
15 exactly the same criminal conduct, the inputting and then the
16 releasing of the data to DFAS. We decline to label separate
17 keystrokes as separate offenses where inputting and releasing the
18 data were both essential acts in fulfilling the appellant's criminal
19 conduct." In this instance, you could make the same argument for the
20 taking. You cannot label the taking and the giving them as separate
21 criminal acts, 641 and 793, or 641 and 1030, when both--when that act
22 is an essential act in order to commit the alleged offense that the
23 government is charging. And because of that, that is why you cannot

1 charge the two separate offenses. They should be determined to be an
2 unreasonable multiplication of charges when the government has done
3 that because they weren't charged in that fashion for a contingency
4 of proof. They were charged in that fashion to double the punishment
5 for every one of the 793 offenses; double the punishment for the 1030
6 offense. And that is textbook *Quiroz*, where you have piled on
7 offenses to increase the overall maximum punishment. If the accused
8 is found guilty then obviously it is not only an increased amount of
9 convictions but now the maximum punishment is in the stratosphere due
10 to the way you charged it. And, of course, the government would be
11 arguing for a higher punishment based upon the maximum possible
12 punishment. For that reason, the defense requests that you look at
13 4, 6, 8 and 12 and you dismiss those specifications as unreasonable
14 multiplication of charges and allow the government to go forward on
15 the offense that is the offense that they are alleging, and that is
16 the unauthorized disclosure.

17 And the second way the government has done an unreasonable
18 multiplication charges is related in that they have taken offenses
19 that occurred on the same day and they chose to divide them up into
20 separate offenses. And, this is similar to the *Gilchrest* case that
21 the defense cites in its motion.

22 MJ: Doesn't that depend on what the evidence is? Doesn't the
23 government dispute that?

1 CDC[MR. COOMBS]: And, you are correct, Your Honor. I believe
2 at least with regards to the second request by the defense, that is
3 going to probably be something that the court would have to hear the
4 evidence based upon the government's position, that they believe
5 those offenses occurred on different days. But, when you look at the
6 *Gilchrest* case, you have an accused goes into her room and he takes
7 pills and money and the government chooses to charge that as two
8 separate larcenies, and the court said, "No, I mean, you have a
9 single larceny that occurred at the same time, you cannot charge two
10 separate larcenies just because separate items have been taken." So,
11 with regards to the first request by the defense, we do believe you
12 can rule on it here today.

13 MJ: This is Specifications 4, 5, 6 and 7 of Charge II?

14 CDC[MR. COOMBS]: Exactly, Your Honor. So, when you look at 6
15 and 7, and just for demonstrative purposes, four sheets of paper
16 together.
17 [The civilian defense counsel used pieces of paper to represent each
18 charge.]

19 CDC[MR. COOMBS]: So, 6 and 7 are the Iraq SIGACTs or Iraq
20 database, excuse me. And, 7--the other specification is the
21 Afghanistan database. So, the government's information that they
22 have, which we gave to you as part of the classified attachments to
23 this motion, show a memorandum which talks about, allegedly from my

1 client, which indicates that these items were sent out on a
2 particular day.

3 MJ: Let me stop you just there. Classified attachments to this
4 motion, I do not see any attachments, where is that?

5 CDC[MR. COOMBS]: Again, the government had agreed to provide
6 the court with classified attachments to this motion.

7 MJ: So it's their attachments are talking about?

8 CDC[MR. COOMBS]: No, Your Honor. It was attachments to the
9 defense's motion but due to the logistics of providing that, not
10 having SIPRNET access, the government indicated that it would provide
11 the court with the referenced attachments. And that was in e-mail
12 form, not only to the defense, but also to the court.

13 MJ: All right, proceed.

14 CDC[MR. COOMBS]: So, the report that we want you to look at,
15 hopefully you have it, if you do not, the government can provide it
16 to you, is at Bates number 00125319 through 31. And what that shows
17 is, if it is true, it shows that there was a disclosure of the Iraq
18 and Afghanistan SIGACTs on the same day, the unauthorized disclosure.
19 So, you have the Iraq and Afghanistan SIGACTs going out on the same
20 day and what the government has chosen to do is divide those two into
21 two separate 793 offenses by charging the Afghanistan and Iraq
22 separately. And as we covered before, then they have also charged a
23 641 offense for each one of those 793 offenses. So, what the

1 government has done is we have taken a single disclosure of the Iraq
2 and Afghanistan databases that occurred on the same day, it should be
3 one 793 offense for a 10-year max and they divided it into
4 essentially four separate offenses increasing the overall punishment
5 from 10 years to 40 years due to their creative drafting. The second
6 example ma'am, of the unreasonable multiplication of charges is
7 Specifications 10 and 11, and for this ma'am, the defense concedes
8 that the court would have to wait until hearing the evidence that the
9 government presents and the evidence that the defense presents in
10 order to determine whether or not this constitutes a single
11 transaction committed on the same day. But, it is the defense's
12 position that Specifications 10 and 11 address a alleged act that
13 occurred on the exact same day and yet the government has chosen to
14 charge it as two separate 793 offenses. Again, recognizing that it
15 is the government's position that they did, in fact, occur at
16 drastically different dates then the court would have to
17 understandably hear the evidence and see the evidence before making
18 this determination.

19 So, it would be the defense's intent with regards to this
20 request that the court would table a ruling until the conclusion of
21 the government's case in chief in which, I guess, the defense would
22 renew its request for Specifications 10 and 11. But, going back to
23 4, 5, 6 and 7, there is no good faith basis for charging them on

1 separate dates. Granted, the government may not have to stand and
2 give a proffer as to why but the evidence that came out through the
3 32 and the Bates number that the defense provided to the court
4 clearly indicate that if an authorized disclosure occurred from my
5 client, it occurred on the exact same date referencing both of those
6 databases. So for that reason, those two specifications should be
7 combined into one specification alleging 793. And then, with regards
8 to the 641 offenses that goes back to our first argument saying that
9 the two 641 offenses should be dismissed.

10 MJ: All right, thank you.

11 ATC[CPT MORROW]: Your Honor, the United States requests you
12 deny the defense motion to dismiss and/or consolidate the
13 specifications as an unreasonable multiplication of charges. The
14 United States maintains that none of the *Quiroz* factors are met in
15 this case.

16 Beginning with Specifications 4 and 5, 6 and 7, and 8 and
17 9, so I will sort of address each of those--well, I will address
18 those as one group and then the other thing separately. In each of
19 the paired specifications as stated by the defense, the United States
20 charged the accused with the theft of specific information and the
21 transmission of information to unauthorized persons. Although the
22 specifications deal with the same--information owned by the same
23 organizations, so for example, Specifications 4 and 5 deal with the

1 CIDNE-Iraq database or records from that database. The act, the
2 actual specific act of theft occurred as a distinct, separate
3 criminal act from the transmission. And, this is demonstrated by the
4 fact that the paired specifications, so 4 and 5, 6 and 7, 8 and 9
5 have entirely different elements.

6 Further, the number of specifications do not misrepresent
7 or exaggerate the accused's misconduct in any way. In this case the
8 prosecution endeavored to charge the accused with the offenses that
9 most accurately described his misconduct. The defense would of
10 course prefer that the government summarizes the accused's misconduct
11 with a simple transmission offense that simply ignores the misconduct
12 that makes his case so unique.

13 Additionally, the specifications at issue do not
14 unreasonably increase the accused's punitive exposure in any way.
15 The key, of course, to that analysis is the word, "unreasonably", the
16 accused was charged with very specific offenses the government
17 alleges he committed. And, in this case in particular, the punitive
18 exposure of the accused is not, in any way, increased because of the
19 presence of article--the Article 104 charge which carries a sentence
20 of--or a possible maximum punishment of life.

21 And finally, with respect to the use of 18 U.S.C. 641,
22 there is absolutely no evidence that the application of that statute
23 in this case somehow constitutes prosecutorial overreaching or abuse

1 as the defense stated in their motion. There is clear federal case
2 law touching on the use of 18 U.S.C. 641 in the area of information
3 relating to national defense.

4 MJ: What cases would that be?

5 ATC[CPT MORROW]: That would be *United States v. Fallon* cited in
6 the government motion. I can give you a cite if you want.

7 MJ: I have it.

8 ATC[CPT MORROW]: You have it. As well as *United States v.*
9 *Morison*, also cited in the government motion. Your Honor, many of
10 the same points can be made with respect to the use of 18 U.S.C. 641
11 and 18 U.S.C. 1030(a)(1) for Specifications 12 and 13. Again, you
12 are talking about, in specification 12, you are talking about the
13 theft of more than 250,000 records from the Department of State. In
14 Specification 13, we are talking about the transmission of a portion
15 of those records to unauthorized persons. 1030(a)(1) is of course a
16 complicated statute but again, the gravamen of that offense is the
17 use of a computer to obtain and ultimately transmit classified
18 information to persons not entitled to receive them. 18 U.S.C. 641,
19 I stated earlier, is a theft offense, the theft of government
20 property and it focuses on theft or knowing conversion of government
21 property; in this case, information. Specification 12, of course,
22 the government's view reflects the accused's misconduct in this case,
23 the wholesale theft of more than 250,000 records. And, the two

1 specifications taken together do not unreasonably increase the
2 accused's punitive exposure in the context of the entire charge
3 sheet. With respect to the defense claim that Specifications 4, 5, 6
4 and 7 occurred on the same date, Your Honor, the defense is
5 incorrect. The evidence, and a plain reading of those specifications
6 contradict this assertion entirely. As outlined in our motion the
7 evidence will show that the theft of the CIDNE-Afghanistan and CIDNE-
8 Iraq databases occurred on separate days if you look at the
9 specifications there: Specification 4, "between on or about 31
10 December and 5 January 2010", for the CIDNE-Iraq database;
11 Specification 6, "between on or about 31 December and on or about 8
12 January 2010". And as cited in our motion, the evidence, at least in
13 the forensic examination of the SD card, indicates that those
14 databases were stolen on different days.

15 Moving to the transmission of records, again, the SD card,
16 the forensic examination of the SD card showed those files were
17 likely transmitted on or around January 30 of 2010. So, you know,
18 almost 3 weeks from the date that they were stolen. And finally----

19 MJ: So, it is the government's position then that the evidence
20 is going to show that the thefts under Specifications 4 in 6 occurred
21 on different days?

22 ATC[CPT MORROW]: Yes, ma'am. That is the government's
23 position.

1 MJ: And----

2 ATC[CPT MORROW]: And the government's position is also that
3 transmission of those records occurred on different days from the
4 thefts of those records.

5 MJ: All right, and is any part of that attachment this forensic
6 examination?

7 ATC[CPT MORROW]: Yes, ma'am, it was--well, it was in enclosure
8 to the prosecution's motion, but it was already--it had been
9 referenced in the--or, it was supposed to be an attachment to the
10 defense motion and we will figure out what happened, but of course we
11 will get that to you.

12 MJ: All right, so it is the government's position then this
13 forensic examination is going to show that the theft in Specification
14 4 purloined?

15 ATC[CPT MORROW]: On or around 5 January.

16 MJ: And Specification 6?

17 ATC[CPT MORROW]: On around 8 January.

18 MJ: What about the transmissions?

19 ATC[CPT MORROW]: On or about 30 January 2010.

20 MJ: For both of them?

21 ATC[CPT MORROW]: Yes, ma'am.

22 Now, the government would concede that those--that at least
23 the transmission of those records would not be unreasonable

1 multiplication of charges. They do deal with entirely different sets
2 of information. If they were transmitted in the same--the evidence
3 would likely show that they were transmitted on the same day at least
4 but to those, we still would not concede that those would be an
5 unreasonable multiplication of charges.

6 MJ: Okay, when you say the same day, is it the same
7 transmission?

8 ATC[CPT MORROW]: All, it is--they were included in the same
9 file. So yes, the government would concede they were likely in the
10 same file, the evidence would likely show that.

11 MJ: All right, the government theory then for the
12 specifications of transmission.

13 ATC[CPT MORROW]: Yes, ma'am.

14 MJ: What is the government theory of what occurred?

15 ATC[CPT MORROW]: For the transmission?

16 MJ: Yes.

17 ATC[CPT MORROW]: That the two databases were consolidated into
18 one file and that they were transmitted in that file.

19 MJ: In a single transmission?

20 ATC[CPT MORROW]: Likely in a single transmission, yes ma'am.

21 MJ: All right, proceed.

22 ATC[CPT MORROW]: Finally, with respect to Specifications 10 and
23 11 of Charge II, as the defense acknowledged today and as they

1 acknowledged their motion, we have alleged that this misconduct
2 occurred months apart. Specification 10, of course, is concerned
3 with is conduct that occurred, the transmission of national defense
4 information in the December/January timeframe, whereas the national
5 defense information transmitted in Specification 11 occurred, or
6 allegedly occurred sometime in April. So, I think there is no
7 evidence there that these are--this was substantially one
8 transaction; entirely different transmission and the evidence will
9 show that, as it did at the Article 32.

10 MJ: Okay.

11 ATC[CPT MORROW]: Subject to your questions.

12 MJ: Thank you. Mr. Coombs?

13 CDC[MR. COOMBS]: Yes, ma'am, just briefly. I am following up
14 on one point of the government with regards to the punitive exposure.
15 The defense's position on that would be that the correct focus under
16 Quiroz is not on the overall array of charges by the government, but
17 on the specific transaction we are dealing with. When you look at
18 R.C.M. 307(c)(4), it clearly states, what is substantially one
19 transaction should not be made the basis for an unreasonable
20 multiplication of charges. The focus is on the transaction not the
21 overall charge sheet. If the government's position were correct,
22 then if an accused were charged with an offense that carried with it
23 life, say, or death, then under no circumstances could their charge

1 sheet ever be attacked for being an unreasonable multiplication of
2 charges because the maximum punishment is already death or life
3 without parole. That is not the correct focus. *Quiroz* too focuses
4 in on the transaction. So, how do you take one transaction and
5 unreasonably multiplied that into separate transactions? And, from
6 the government's own concession, just dealing with the 793 offenses,
7 dealing with the CIDNE Iraq and CIDNE Afghanistan, there you have a
8 clear example of taking one transaction and dividing for no other
9 purpose than increasing the punishment. It is almost the textbook
10 example of *Quiroz* where you charge the appellant, in this case my
11 client, twice with the exact same offense. And just like in *Quiroz*,
12 the maximum punishment went from 10 to 20 years for that wrongful
13 sale of C4. Here, under the government's charging theory, the
14 maximum punishment for the unauthorized disclosure of the CIDNE
15 database goes from 10 to 20 years based upon an arbitrary splitting
16 of that. So, the correct focus of this court should be looking at
17 *Quiroz* and R.C.M. 307(c)(4) when making the determination of whether
18 or not something is unreasonable multiplication of charges, not on
19 what is the overall array of charges that the government has decided
20 to charge my client with.

21 Thank you, Your Honor.

22 MJ: All right, thank you Mr. Coombs.

1 All right, the court is going to take a recess. I am not
2 sure how long it is going to be at this time. What I will do is it
3 will be at least 10 minutes. But, I will have the bailiff ready in
4 10 minutes to advise the gallery if the recess is going to be any
5 longer.

6 Court is in recess.

7 **[The Article 39(a) session recessed at 1051, 25 April 2012.]**

8 **[The Article 39(a) session was called to order at 1126, 25 April**
9 **2012.]**

10 MJ: This Article 39(a) session is called to order. Let the
11 record reflect all parties present when the court last recessed are
12 again present in court.

13 I have been advised by the bailiff that there has been some
14 noise in the gallery during some of the oral argument. This is a
15 public trial. Although the public is invited to stay and attend, but
16 I would ask you please remain silent when the counsel are arguing
17 their points, thank you.

18 All right, I have the final scheduling order that we
19 discussed earlier to be marked as the next Appellate Exhibit in line.
20 And for the record, trial counsel is giving me the attachment that
21 was discussed for the last motion to review when the court recesses
22 and court intends to do that, is that correct?

1 TC[MAJ FEIN]: Yes, Your Honor. It will be given to the court
2 security officer and then to the Court.

3 MJ: All right. And the court schedule then is Appellate
4 Exhibit 70. Do counsel have anything to raise before we move on to
5 the next motion at issue here?

6 CDC[MR. COOMBS]: No, Your Honor.

7 TC[MAJ FEIN]: No, Your Honor.

8 MJ: All right, and I believe the next motion at issue is the
9 defense motion to dismiss Specification 1 of Charge II for failure to
10 state an offense. Before we proceed, I do have a question for the
11 government. As I am looking at the charge sheet I am seeing they are
12 called "Additional Charges". Is that--oh, additional is crossed out
13 on the charge sheet?

14 TC[MAJ FEIN]: Yes, Your Honor.

15 MJ: All right, it appears an earlier draft I have, it was not.
16 Mr. Coombs, please.

17 CDC[MR. COOMBS]: Ma'am, the defense requests that this court
18 dismiss Specification 1 of Charge II for failing to state a
19 cognizable offense for two reasons. First, the specification as
20 drafted is currently--as it is currently drafted, is preempted by
21 Article 104. And second, in the alternative, the specification must
22 be charged as a violation of Article 92 and not Article 134 since

1 there is a lawful order or regulation prohibiting the unauthorized
2 possession and dissemination of classified information.

3 With regards to the first argument, the preemption doctrine
4 applies and prohibits application of Article 134 to conduct covered
5 through Articles 80 and 132. Determining whether or not the
6 preemption doctrine applies, the court applies a two-prong test.
7 First it must be shown that Congress intended to limit charging the
8 alleged conduct under the enumerated article. And second, it must be
9 shown that the Article 134 offense is essentially a residuum of the
10 elements of the enumerated offense within the UCMJ.

11 With regards to the first prong, Congress's intent,
12 Congress has clearly intended that Article 104, in this place,
13 occupied the field when it deals with providing information or
14 communicating to the enemy. And, Congress has done this under
15 Article 104 through very broad language. The article punishes anyone
16 who would aid, attempt to aid, knowingly harbor, protect, give
17 intelligence to, communicate with, correspond with, or hold any
18 intercourse with the enemy whether that be through direct or indirect
19 means. Through this direct legislative language it is clear that
20 Congress' intent was that Article 104 would occupy the field and they
21 left no doubt that what you are charging any sort of conduct dealing
22 with aiding or communicating to the enemy it must be charged, if at
23 all, under Article 104.

1 MJ: And how do you distinguish *Anderson*?

2 CDC[MR. COOMBS]: The *Anderson* case, it is important to, when
3 you look at *Anderson*, ma'am, to read its statement in context in what
4 *Anderson* was looking at. *Anderson*, there they determined that the
5 offense at issue, the 134 offense was not an offense that dealt with
6 communicating with the enemy. For the *Anderson* court what was
7 important was that the Article 104 offense dealt with communications
8 with the enemy.

9 The 134 offense was offenses similar to that but offenses
10 where who you communicated with was immaterial. So, the important
11 distinction in *Anderson* that is not applicable here today is unlike
12 in *Anderson*, the Article 104 offense specification of Charge I and
13 the Article 134 specification, Specification 1 of Charge II are not
14 aimed at distinctly separate conduct. They are essentially the
15 exactly the same offense both alleging that PFC Manning provided
16 intelligence information to WikiLeaks knowing that that information
17 would be accessible to the enemy.

18 So, the distinction that *Anderson* court considered to be
19 very important, that the 134 offense was actually applying to just
20 unauthorized disclosure immaterial as to who that would go to does
21 not exist here today because the government has grafted onto its 134
22 offense essentially the 104 allegation. In this case, with knowledge
23 that the information disseminated would be accessible to the enemy.

1 So, the first prong of the kick test is established. Congress did,
2 in fact, determine that Article 104 should occupy the field with
3 regards to communications to the enemy. The second, the Article 134
4 specification, is a residuum of the elements of Article 104. The
5 government has alleged within the Article 134 specification that my
6 client has wrongfully and wantonly caused to be published on the
7 Internet intelligence belonging to the United States, thereby
8 providing such intelligence to persons not entitled to receive it,
9 having knowledge that intelligence published on the Internet is
10 accessible to the enemy. The 134 specification in this case is
11 essentially the 104 specification without the "knowing" *mens rea*
12 element put in there; instead they have substituted wrongfully and
13 wantonly.

14 Under *United States v. Norris* this is very similar to what
15 the government tried to do in that case where they took a larceny
16 offense and they created a wrongful taking under Article 134 and the
17 Court in *Norris* stated that there is no such thing as wrongfully
18 taking. You cannot take one of the enumerated offenses and eliminate
19 the *mens rea* requirement and thereby create a whole new offense under
20 Article 134. And, that is exactly what the defense----

21 MJ: Are they eliminating the *mens rea* requirement, or changing
22 it?

1 CDC[MR. COOMBS]: There is eliminating the mens rea requirement
2 from the standpoint of, "knowing", and they have changed to,
3 "wrongfully and wantonly", which in *Norris*, they eliminated the
4 intent to permanently deprive and they created a wrongful taking,
5 just essentially, "You should not have taken it." So, they created a
6 different *mens rea* which the court there said, "You cannot do that.
7 You cannot use 134 to eliminate a needed element from one of the
8 enumerated offenses and then charge it has a 134 offense.

9 MJ: So, in *Norris* did they take out--did they substitute or
10 make a different *mens rea* or did they take a *mens rea* altogether?

11 CDC[MR. COOMBS]: They substituted, ma'am. So, what they did
12 there is a created a wrongful taking so they just did a "wrongfully",
13 and it was basically a hybrid offense that was not larceny or a
14 wrongful appropriation. So, under the residuum analysis, again, the
15 defense say that in this example a second prong is also satisfied.
16 So, the court should find that the 134 offense is, in fact, preempted
17 by the 104 offense. In the alternative, if the court does not find
18 preemption, the defense's position is that this offense must be
19 charged, if at all, as a violation of Article 92 to serious, in fact,
20 a lawful order, regulation that governs this conduct. The MCM
21 provides----

22 MJ: Are you talking about Army Regulation 380-5?

23 CDC[MR. COOMBS]: That is correct, Your Honor.

1 MJ: Do you agree that is a punitive regulation?

2 CDC[MR. COOMBS]: Yes, I do, your Honor. And in addition to
3 that, the government has charged 380-5 in Specification 5 of Charge
4 III, also indicating that clearly it is a punitive regulation. If
5 Your Honor looks to Section 412--of 112, excuse me Section 4, 112 of
6 the Manual, the MCM provides there that any conduct falling with
7 Article 34's reach is specifically made punishable by another article
8 of the code it must be charged as a violation of that article. So,
9 this, ma'am, is under Article 134 and again on page--Section 4, 112.

10 MJ: All right, (a), (b), (c), (d), (e), where are you looking
11 here?

12 CDC[MR. COOMBS]: If you go down, ma'am, to (c)(1).

13 MJ: Okay.

14 CDC[MR. COOMBS]: And, it is basically toward the very bottom,
15 "any conduct of this nature is specifically made punishable by
16 another article of the Code, it must be charged as a violation of
17 that article. And, as we just discussed, AR 380-5 is, in fact, a
18 punitive regulation. It punishes any Soldiers and makes them subject
19 to sanctions if they knowingly, willfully or negligently disclose
20 classified or sensitive information to unauthorized persons. So,
21 this offense, if at all, should be charged as a violation of AR 380-5
22 under Article 92 and not created an offense under Article 134.

1 MJ: What is the defense's position with respect to the
2 government argument that intelligence goes beyond classified
3 information?

4 CDC[MR. COOMBS]: With regards to intelligence, it could be
5 classified or could be unclassified that is basically distinction
6 without merit because the material is governed by AR 380-5, even the
7 government cites within the Article 104 motion, which we will cover
8 later today, they cite 380-5 and AR 530-1 as the two regulations that
9 provide notice to a Soldier as to their obligations to handle
10 information that is charged in this case. So, 380-5 does not make
11 the distinction on intelligence or not. It is classified or
12 sensitive information, which intelligence would be a subset of that.

13 MJ: Okay.

14 CDC[MR. COOMBS]: So again, the defense's position would be that
15 because the government did not charge it as a 92, it cannot survive
16 as a 134 and we would point the court to the rule outlined in *Borunda*
17 as well as the MCM. And, in *Borunda* 67 MJ 607, the Air Force Court
18 recently clarified the interplay between Articles 92 and 134. And,
19 in that court's opinion, it stated, "When a lawful general order or
20 regulation proscribing certain conduct exists, an order or regulation
21 which by definition is punitive, the proscribed conduct, if charged,
22 will only survive legal scrutiny as a violation of Article 92, UCMJ
23 and not as a violation of Article 134. So again, therefore, under

1 the rule cited in *Borunda* which relies upon *Caballero* which is a CMA
2 case which also supports the same proposition, that the government is
3 not allowed to use 134 in order to charge a Article 92 offense if
4 there is a punitive regulation that governs the conduct. So, either
5 under the preemption doctrine or under the rule--as outlined in
6 *Borunda* and the MCM, the defense would request that this court
7 dismiss Specification 1 of Charge II.

8 Subject to your questions ma'am.

9 MJ: I do have one. Just a moment. Paragraph 1-21, Army
10 Regulation 380-5 says that Department of the Army personnel will be
11 subject to sanctions if they knowingly, willfully or negligently
12 disclose classified or sensitive information to unauthorized persons
13 or violate any other provision of the regulation. Is it paragraph 1-
14 21, the disclosure, the knowing, willful and negligent disclosure of
15 classified or sensitive information to unauthorized persons, is that
16 the piece of the regulation and you are saying is being violated by
17 the conduct in Specification 1 of Charge II?

18 CDC[MR. COOMBS]: That is correct, Your Honor.

19 MJ: So, not some other paragraph of the regulation?

20 CDC[MR. COOMBS]: No, I mean, you could, as the government
21 charged Paragraph 7-4(a) for the unauthorized storage, I mean, you
22 could say that as well.

1 MJ: I mean the conduct at issue in Specification 1 of Charge
2 II.

3 CDC[MR. COOMBS]: Is providing information to an unauthorized
4 person, in this case, the government has added the enemy aspect, but
5 if you just look at the unauthorized disclosure, yes ma'am. That
6 would be conduct under paragraph 1-21(a).

7 MJ: And how--is there a distinction between this paragraph 1-A
8 [sic] talks about knowingly, willfully and negligently and the *mens*
9 *rea* in Specification 1 of Charge II is, "wrongfully and wantonly".
10 Does that make any distinction--does that make any difference?

11 CDC[MR. COOMBS]: It doesn't, ma'am. The reason why, under the
12 defense's position is that this is a created offense by the
13 government. So, they chose the language of wrongfully and wantonly
14 to create the 134 offense. The wrongfully and wantonly, you could
15 look to that and say, "I guess wantonly might be a form of
16 negligently, kind of a gross negligence." The wrongfully----

17 MJ: That is a bit more of a "reckless", then, right?

18 CDC[MR. COOMBS]: Yeah, yes, ma'am. It is like a reckless
19 disregard would be the standard, at least what we would provide under
20 the bench book instruction for wantonly. With regards to the
21 "wrongfully", you could say that that is equivalent to a willful act.

22 MJ: Okay, I guess where I am going with my question is,
23 wantonly is not a subset of negligent. Negligent would be a subset

1 of wanton. So, what is--is there any kind of a distinction, because
2 the wanton conduct would not be captured under that particular
3 paragraph, would it?

4 CDC[MR. COOMBS]: Well, if you were just simply comparing the
5 two *mens rea*, the defense would agree with you that if you are saying
6 one offense is saying wantonly and one offensive saying negligently,
7 those are two different *mens rea* requirements. We see that in other
8 offenses within the bench book. Here, though, it is not really a
9 distinction that really makes a difference because the offense as
10 alleged by the government is an improper offense. For either the
11 preemption issue, because they were taken to, "knowingly" out and
12 substituted a different *mens rea*----

13 MJ: Okay, I have got that, but I am looking at this particular
14 narrow issue.

15 CDC[MR. COOMBS]: Or, what they have done is they have created
16 an offense where there is a regulation that governs it. If all that
17 is required to get around, let us say an Article 92 violation, and to
18 use a better example, the *Borunda* case. The all that was required
19 for the government to get around the issue in *Borunda* was to change
20 the *mens rea* slightly but still alleged an offense that is governed
21 by regulation, then you would not have the need for the language
22 within the manual directing that any conduct under Article 92 must
23 be--or at least, any conduct under another article must be charged

1 under that article. The whole analysis by the court in *Borunda* and
2 the Court of Military Appeals *Caballero* would not make sense because
3 again, all the government would have to do is create a *mens rea* that
4 still governs the conduct, and that is the key aspect, what conduct
5 have you committed or allegedly committed and is that governed by a
6 regulation. One of the commentators that the defense cites within
7 its motion just talking about whether or not clause 1 and 2 no longer
8 really makes much sense under 134 given the amount of conduct that we
9 charge--or, the amount of regulations that we have now discovered
10 just about every type of conduct. The defense would say that that
11 would be support for the idea that if the conduct, and that is the
12 focus, the conduct is governed by a particular regulation, you cannot
13 create a 134 offense. And, you certainly cannot avoid the
14 requirement to charge it as a 90--Article 92 by creating a new *mens*
15 *rea* whether that be wantonly or they could have come up with
16 something similar to the *Norris* case where they created just a,
17 "wrongful", instead of the required *mens rea*.

18 MJ: Is "wrongful" a *mens rea*?

19 CDC[MR. COOMBS]: Well, it is an act more so than anything else,
20 a valid legal justification or excuse. But, in the *Norris* case that
21 is what they did, they did it as, "wrongful". And, the idea was you
22 almost basically eliminate it and you had an allegation of the taking
23 somehow was not with legal justification or excuse but that is not a

1 defense. So, technically, no, ma'am. But, in the case that is how
2 they used, "wrongful".

3 MJ: Thank you.

4 CDC[MR. COOMBS]: Thank you, ma'am.

5 MJ: Major Fein--excuse me, Captain Whyte?

6 ATC[CPT WHYTE]: Ma'am, the government is asking that you deny
7 defense's motion to dismiss the charges because Specification 1 of
8 Charge II is neither preempted by 104, nor should be charged as an
9 Article 92 offense.

10 The government agrees with the two-part test outlined by
11 the defense. The two-part test, an affirmative answer must be given
12 to both prongs of that test. First, whether Congress intended on
13 Article 104 to cover a class of offenses in a complete way, if that
14 question is answered in an affirmative answer, then the second
15 question is whether Article 134 is residuum of offenses for an
16 Article 104 prosecution.

17 Congress did not intend for causing intelligence to be
18 published on the Internet to only be punishable by 104. The court in
19 *Anderson* squarely address this issue. In *Anderson*, the 134 offense
20 was disseminating classified--or, disseminating sensitive information
21 to unauthorized persons.

22 MJ: Well, let me--before we get there, classified information,
23 sensitive information, intelligence; what is the difference?

1 ATC[CPT WHYTE]: Intelligence is much broader, Your Honor.
2 MJ: Is it broader than sensitive information?
3 ATC[CPT WHYTE]: Yes, ma'am.
4 MJ: And where does one find those definitions?
5 ATC[CPT WHYTE]: The definition of intelligence is defined in
6 the bench book as information that is at least true in part and is
7 helpful to the enemy for Article 104 purposes.
8 MJ: All right, what about classified and sensitive information?
9 ATC[CPT WHYTE]: Well, classified information is, under 380-5,
10 is information that, depending on the level of classification to the
11 document or to the information, is basically information that could
12 cause damage to United States.
13 MJ: And, sensitive information?
14 ATC[CPT WHYTE]: And sensitive information is somewhat broader,
15 it is information that the United States considers is sensitive but
16 it is not as broad as intelligence, for instance. Sensitive
17 information does not necessarily--sensitive information does need to
18 be true in part but is not as broad as intelligence.
19 MJ: And, where is sensitive information defined?
20 ATC[CPT WHYTE]: The United States would--may I have one second,
21 Your Honor?
22 MJ: Yes, please.
23 ATC[CPT WHYTE]: Thank you.

1 [Pause]

2 ATC[CPT WHYTE]: Ma'am, sensitive information is defined under
3 380-5. Unfortunately, we do not have the regulation in front of us
4 to pull that if you would like, Your Honor, we can go pull that
5 information and define what sensitive information is. But, Your
6 Honor, as far as the preemption argument raised by the defense,
7 again, the Court of Appeals for the Armed Forces has already squarely
8 addressed this issue. In *Anderson*, the 134 offense was disseminating
9 information to two unauthorized persons. The CAAF concluded that the
10 legislative history of 104 does not clearly indicate that Congress
11 intended for disseminating classified--sensitive information to
12 unauthorized persons or offenses similar to disseminating information
13 to unauthorized persons, at issue, to only be punished while under
14 Article 104, to the exclusion of 134. The Article 134 offense that
15 the accused is charged with is a similar offense to the Article 134
16 offense in *Anderson*. Furthermore, even if the court decides that
17 *Anderson* does not foreclose this issue, military courts are in
18 agreeance[sic]--agreement, rather, that "Courts should be extremely
19 reluctant", that is the language cited in *Kick*, a Court of Military
20 Appeals case in 1979, to be "Extremely reluctant to find that the
21 preemption doctrine applies absent a clear showing of contrary
22 intent." Here, the parties are not present in court with any
23 evidence showing whether or not Congress clearly intended for Article

1 104 to cover this class of information. The defense is citing the
2 language of Article 104 but there is absolutely no intent. There is
3 no legislative history on this issue.

4 MJ: What is the government's position about the, from the
5 defense going back to prong one, that there is this distinction
6 between the *Anderson* case, and that there were two 104 charges aimed
7 at communicating with the enemy where the 134 offense was the
8 unauthorized disclosure regardless of intent and your specification
9 here, with the added language?

10 ATC[CPT WHYTE]: Yes, ma'am. The Article 134 offense in
11 *Anderson* is a similar offense to the Article 134 offense facing the
12 accused here. It does not--the CAAF clearly outlined that, that the
13 legislative history was not clear on this issue and absent a clear
14 showing to the contrary, courts generally are reluctant to rule that
15 the preemption doctrine does apply. As for--so assuming for argument
16 purposes the court finds that Congress clearly intended for Article
17 104 to punish the offense for 134 we move to the second question. Is
18 the 134 offense a residuum of elements for the 104 prosecution? The
19 answer is clearly, no. There are no similar elements to either
20 offense or to both offenses. First of all, a *mens rea* is very
21 different. For the 134 offense it is a "knowing and wanton" cause
22 for intelligence to be published on the Internet. Under the model
23 Penal Code, wanton is defined in the MCM but under, I believe it is a

1 111 offense. And as Your Honor pointed out, it is "reckless" *mens*
2 *rea*. Under the model Penal Code, that is defined as when a person
3 consciously disregards a substantial and unjustifiable risk, that the
4 material element exists or will result from his conduct. 104 offense
5 on the other hand is a, "knowingly", *mens rea*. Again, the model
6 Penal Code, a person is aware that his conduct is of that nature or
7 that such circumstances exist or the person is practically certain
8 that his conduct will result--will cause a result. The *mens rea* for
9 the 134 and the 104 are different.

10 Additionally, the 134 offense does have--does contain
11 additional elements. First of all, the *mens rea*, the United States
12 has to prove that the accused acted wantonly, when he caused
13 intelligence to be published on the Internet. Second, we have to
14 actually prove that the accused caused intelligence to be published
15 on the Internet. Third, like all 134 offenses, prejudicial to good
16 order and discipline--clause 3 of 134, prejudicial to good order and
17 discipline and service discrediting. And then, lastly, this
18 additional *mens rea* of knowing that the enemy--or, intelligence
19 published on the Internet is accessible to the enemy. Additionally,
20 the 104 offense, unlike the 134 offense, requires, at least subject
21 to your instructions, ma'am, requires the prosecution to prove that
22 the enemy actually gained receipt of that intelligence. The 134
23 offense does not require that.

1 Your Honor, now, if you don't mind, Your Honor, we would
2 like to move to the Article 92 argument the defense raises. The
3 defense is arguing that 380-5 specifically, like Your Honor pointed
4 out, 1-21(a), that this--that the 134 conduct is conduct that falls
5 within that purview, that is simply not the case. As Your Honor
6 pointed out, Article 90--380-5 punishes the dissemination of
7 classified or sensitive information. Here, we are talking about
8 intelligence which is any information at least true in part, that is
9 helpful to the enemy. The defense relies heavily upon the case of
10 Norris which is a controlling case here for the preemption argument.
11 What the defense fails to acknowledge however is that there was
12 clear--there was not a clear legislative history, clear intent by
13 Congress to limit--rather for the punitive article to apply to a 134
14 offense. The Norris decision----

15 MJ: And, how did they figure that out, what did they say?

16 ATC[CPT WHYTE]: The Court found that the drafters clearly said--
17 -clearly intended for wrongful taking to equal wrongful
18 appropriation, which included wrongful conversion. So, they found
19 that clear legislative history, but here we do not have that. The
20 government will admit that there is very limited legislative history
21 on 104. So, absent a clear showing to the contrary, again, the Court
22 should be reluctant to rule that the preemption doctrine applies.
23 Furthermore, just to recap, Your Honor, there are no elements--this

1 is not--104 is not a residuum--or, the 134 is not a residuum of the
2 104. And then lastly, the 134 offense is not punishable under
3 Article 92.

4 MJ: Let's look at that for just a minute. Article 92, if this
5 is just classified or sensitive information, what would the
6 Government's position be?

7 ATC[CPT WHYTE]: If the accused is charged with just
8 compromising classified or sensitive information?

9 MJ: Your entire specification, except for the word,
10 "intelligence", with classified and sensitive information.

11 ATC[CPT Whyte]: Well, the United States would argue that 380-5
12 does require the disclosure of this information to unauthorized
13 persons. Here, the 134 is geared toward the causing to publish on
14 the Internet. The 134----

15 MJ: Isn't that a disclosure to unauthorized persons?

16 ATC[CPT WHYTE]: We would argue that disclosing it to the
17 Internet is different than the 380-5.

18 MJ: How?

19 ATC[CPT WHYTE]: Because disclosing it to the Internet makes it
20 available to the world, essentially.

21 MJ: So, to authorized and unauthorized persons?

22 ATC[CPT WHYTE]: Yes, ma'am. That is with the government would
23 argue, yes, ma'am.

1 MJ: Okay, any other argument?

2 ATC[CPT WHYTE]: Furthermore, the *mens rea* is different for the
3 380-5.

4 MJ: Now, what is the government's position with respect to the
5 defense argument, "Hey, you have a controlling regulation here, you
6 cannot just change the *mens rea*"?

7 ATC[CPT WHYTE]: Well, Your Honor, we do not get, obviously, to
8 that argument unless Your Honor concludes that classified or
9 sensitive information is broader than the, "intelligence", of the
10 134. The 134 is geared to encompass more than classified or
11 sensitive information which 380-5 is designed to punish.

12 MJ: Okay. Address the intent issue, please. Because, I am
13 looking at the cases. The cases that the defense is citing, *Borunda*
14 and the other case, *Caballero*, I believe it is involve possession of
15 drug paraphernalia. There is no intent. You possess it or you do
16 not. So, how does intent play into all of this?

17 ATC[CPT WHYTE]: Well, the Article 134 offense does not require the
18 United States to prove, necessarily, that the accused intended for
19 this information--intended--the whereabouts--where this information
20 intended--the recipients rather, I am sorry, recipient of this
21 intelligence, being the enemy.

22 MJ: Okay, I think my question was not clear. Where looking at
23 this is if the regulation, Paragraph 1-21 says that, "DA personnel

1 will be subject to sanctions if they knowingly, willfully, or
2 negligently", those are the three intents, "Disclose classified or
3 sensitive information to unauthorized persons." The specification at
4 issue here has the *mens rea* of, "wantonly". Is there any case law to
5 your knowledge one way or the other on whether--where a regulation
6 discusses, or in this case, punishes knowing, willful, and negligent
7 disclosure of classified or sensitive information? Does that
8 preclude a specification under Article 134 alleging a wanton
9 disclosure?

10 ATC[CPT WHYTE]: Well, the United States would argue that the,
11 "wanton" *mens rea* is different than obviously the "knowing". Someone
12 could be acting wrongful--or, wanton and not knowingly, willfully, or
13 negligently.

14 MJ: So, the fact--is my understanding, the government position
15 correctly--the defense position as I understood it was, "If there is
16 a punitive regulation governing the information--or, the conduct at
17 issue, the charge has to be under that regulation as opposed to 134."
18 And my understanding the government position to be, "a regulation can
19 address the issue but if a wanton intent is a different intent and it
20 is prejudicial to good order and discipline or service discrediting,
21 it can be charged under 134"?

22 ATC[CPT WHYTE]: Well, no ma'am, because the 380-5, again, it
23 goes to what information was actually compromised. Again, classified

INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM - Use this form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized.

Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

COPIES - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

ARRANGEMENT - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.
2. Judge advocate's review pursuant to Article 64(a), if any.
3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.
4. Briefs of counsel submitted after trial, if any (Article 38(c)).
5. DD Form 494, "Court-Martial Data Sheet."
6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.
7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

14. Records of former trials.

15. Record of trial in the following order:

- a. Errata sheet, if any.
- b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.
- c. Record of proceedings in court, including Article 39(a) sessions, if any.
- d. Authentication sheet, followed by certificate of correction, if any.
- e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.
- f. Exhibits admitted in evidence.
- g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.
- h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.